A Modest Proposal: The Statutory "No-Cause" Alternative to Wrongful Discharge in California

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After concluding that California wrongful discharge case law has produced a varied and inconsistent set of rules, Professor Prince proposes a statutory alternative to discharge litigation. The proposed statute avoids the question of "just" versus "wrongful" discharge altogether by establishing a "no-cause" discharge option for employers and employees. This option would allow the employer to terminate the employee without cause upon payment of a statutorily calculated discharge payment, thereby addressing the interests of the at will employee as well as the right of the employer to terminate at will.

INTRODUCTION

Employment at will[1] — the doctrine recognizing an employer's contractual freedom to discharge an employee without cause or justification[2] — is generally treated by legal writers as an unsolved, peculiarly hardy, legally sanctioned crime. Article after article returns us to the at will scene. The doctrine's dubious historical origins and

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1. *See* Note, *Limiting the Right to Terminate at Will — Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201, 201-02 n.4 (1982) [hereinafter Note, *Limiting the Right*].

2. In fact, the doctrine applies equally to the right of an employee to depart from the employment relationship at will and without cause. The law of at will termination, however, focuses on the liability of the employer who discharges an employee without the employee's willingness or consent. *See infra* note 16.

pernicious logic are recited, and the hue and cry is raised to excise it from the law of contracts. We are routinely reassured that the end is near, or ought to be.[3]

In fact, the once unconditional right of an employer to discharge a worker for any reason, or for no reason at all, is now significantly qualified and compromised at both the federal and state levels. Congress and state legislatures have defined an ever-expanding number of unlawful causes for discharge.[4] California courts have been at the forefront of a parallel and concurrent attack by the judiciary at both the federal and state levels. The state's courts have turned interpretive somersaults to find public policy protecting employees from discharge, and the cases have developed a host of different theories to compensate the unfairly terminated worker.[5]

Yet the right to terminate an employee at will endures at the federal level, and in all the states.[6] In California, where employment at will enjoys the unusual status of explicit statutory declaration,[7] the doctrine has undergone intense judicial scrutiny, highlighted by a se-

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3. There is a developing and noteworthy countercurrent in the literature recognizing the merit of the employment at will doctrine, and the problems caused by legislative and judicial expansion of employee protection from wrongful discharge. *See, e.g.*, Catler, *The Case Against Proposals to Eliminate the Employment At Will Rule*, 5 INDUS. REL. L.J. 471 (1983) (arguing that judicial and legislative efforts to change the rule have been ineffective, and that employees must look primarily to the collective bargaining process to obtain meaningful protection from unjust dismissal); Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984) (contending that at will discharge should not be judged by occasional cases in which it produces wrongful discharge, but as an efficient, usually justifiable private response to labor problems through contract); Harrison, *The "New" Terminable-at-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327 (1984) [hereinafter Harrison, *An Interest and Cost Incidence Analysis*] (noting that the increase in job security associated with employee protection laws and wrongful discharge litigation will probably be paid for disproportionately by workers with low skills and few alternative employment opportunities); Harrison, *The Price of the Public Policy Modification of the Terminable-at-Will Employment: A Review of the Case Law From Management's Viewpoint*, 51 U. CIN. L. REV. 616 (1982); Note, *Limiting the Right*, *supra* note 1. *See generally* Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983) (suggesting that there is no economically justifiable need for the paternalism reflected in employee protections limiting freedom of contract).

4. *See infra* note 18 and accompanying text.

5. *See infra* notes 16-17 and accompanying text.

6. *Id.*

7. California Labor Code section 2922 states: "[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month." CAL. LAB. CODE § 2922 (West Supp. 1986).

The current version of the statute has undergone a series of amendments, but in its current form is almost identical to the original statute from which it is derived. Section 1999 of the old California Civil Code read: "[a]n employment having no specified term may be terminated at the will of either party, on notice to the other, except where otherwise provided by this Title." CAL. CIV. CODE § 1999 (1872) (amended by 1915 Cal. Stat. 720; 1937 Cal. Stat. 261; 1969 Cal. Stat. 3123; 1971 Cal. Stat. 3186; 1971 Cal. Stat. 3459).

ries of important recent decisions. It has emerged from that judicial gauntlet newly qualified but conceptually intact, its continued existence in the workplace reaffirmed.

The California cases highlight a developing paradox in the law of wrongful discharge: courts and the legislature narrow the permissible bounds of at will termination, but they resolutely refuse or fail to outlaw the doctrine altogether. In so doing, they confirm the legitimacy of an employer's right to "fire at will" unless prohibited by statute or contract. Employment at will, in its modified form, is more firmly entrenched than ever in California employment law.

This Article thus proceeds from the increasingly apparent observation that the doctrine of employment at will has survived its harshest critics, and seems certain to endure in the workplace in the absence of discriminatory, retaliatory, or similar clearly defined unjust causes for discharge. The Article avoids the continuing debate as to whether at will termination is just or defensible, in favor of a more relevant inquiry: first, how the current law distinguishes wrongful from permissible at will termination; and second, how the legislative and judicial interests in employee protection can be reconciled with the insistently surviving at will concept.

The Article briefly reviews the origins of employment at will in California.[8] It next examines the principal cases defining the so-called "California Rule" for wrongful discharge. It suggests that there is no such coherent rule, but rather a series of varied and inconsistent theories of wrongful discharge that are of little predictive value in determining whether an at will employee's termination will be adjudged lawful or wrongful.[9]

This Article then introduces a proposal for avoiding this inconsistency in the wrongful discharge case law.[10] It proposes that employers and employees be subject to a statutory alternative to discharge litigation, allowing them to avoid the question of just versus wrongful cause altogether. The proposed statute would establish for qualifying parties a "no-cause discharge" option, allowing the employer to terminate the employee without cause upon payment of a statutorily calculated discharge payment. The discharge payment amount would vary according to certain employee-specific variables which, for the most part, already have been recognized as significant in the California discharge cases.

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8. *See infra* notes 13-19 and accompanying text.
9. *See infra* notes 20-101 and accompanying text.
10. *See infra* notes 102-33 and accompanying text.

The no-cause discharge proposal would accomodate the interests of the at will employee as well as the right of the employer to terminate at will. It presents an efficient alternative to litigation, but would not preclude employers or employees from electing instead to pursue the discharge controversy in the courts. Its advantage would derive from its provision to employees of a reasonable "buy-out" offer for discharge, and to employers a reliable calculation of the costs of discharge.

At Will Termination in California

A Brief Historical Overview

The literature abounds with analyses tracing the development of the at will termination rule in the United States, at both the federal and state levels.[11] At worst, the rule is recognized as a product of analytical error, manipulative jurisprudence, and the pervasive domination by industry of an unorganized workforce. At best, it is characterized as a curious misappropriation of freedom of contract, out of which has evolved a more enlightened notion of employment as a right, entitlement, or property interest which once acquired cannot be revoked by an employer except under specific, delineated, increasingly unusual circumstances.

There is much to substantiate the thesis of historical error. It is now commonly accepted that the American rule permitting terminable at will employment derives from a single, century-old treatise[12] that misappropriated English master-servant law, and miscited leading contemporary American cases:

> With us the rule is inflexible that a general or indefinite hiring is prima facie the hiring-at-will and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. The hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.[13]

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11. *See, e.g.*, Blades, *Employment At Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Summers, *Individual Protection Against Unjust Discharge: Time for a Statute*, 62 VA. L. REV. 481 (1976); Note: *Guidelines for a Public Policy Exception to the Employment At Will Rule*, 13 CONN. L. REV. 617 (1980); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980) [hereinafter Note, *Protecting At Will Employees*]; Note, *Recognizing the Employee's Interests in Continued Employment — The California Cause of Action for Unjust Dismissal*, 12 PAC. L.J. 69 (1980); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974) [hereinafter Note, *Implied Contract Rights*].

12. H. WOOD, MASTER AND SERVANT § 134 (2d ed. 1886).

13. *Id.* For a more thorough discussion of Wood and the English cases upon

Dubious as its origins may have been, the so-called *Wood's Rule* enjoyed Supreme Court adoption and constitutional support at one time.[14] The doctrine affirmed essential nineteenth-century laissez-faire economic principles, and endured as an attractive reflection of free market doctrine in the employment marketplace.[15] Certainly it tended to support industry control over the workforce in that market.

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which Wood relied, see Professor Feinman's historical analysis in Feinman, *supra* note 11, at 122-27.

Similarly unequivocal language has historically defined the at will relationship in California, as illustrated by an early California Supreme Court opinion:

> Precisely as may the employee cease labor at his whim or pleasure, and, whatever be his reason, good, bad, or indifferent, leave no one a legal right to complain; so, upon the other hand, may the employer discharge, and whatever be his reason good, bad, or indifferent, no one has suffered a legal wrong . . . . These views touching the reciprocal arbitrary right of the employer to employ or discharge labor, without regard in either case to the actuating motives, are propositions settled beyond peradventure.

Union Labor Hosp. Ass'n v. Vance Redwood Lumber Co., 158 Cal. 551, 554-55, 112 P. 886, 888 (1910).

14. In Adair v. United States, 208 U.S. 161 (1908), the United States Supreme Court declared that an employee protection statute prohibiting the discharge of railroad workers because of their union membership was unlawful. The Court reasoned that "the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee." *Id.* at 174-75. The Court thus upheld the concept of employment at will on the theory of mutuality: because the employee could cease working at any time, the employer had a mutual right and remedy of discharge at any time. It concluded:

> In the absence . . . of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be . . . that an employer is under any legal obligation, against his will, to retain an employee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another.

Id. at 175-76.

The Court applied the same reasoning seven years later to invalidate a state statute that prohibited employers from refusing to employ union members, applying the rule to the states through the fourteenth amendment. In Coppage v. Kansas, 236 U.S. 1 (1915), the Court considered and dispensed with the argument that the employer's superior bargaining power deprived the parties of mutuality in fact, recognizing as legitimate those "inequalities of fortune that are the necessary result of the exercise [of contract freedom]." *Id.* at 17.

The Court finally acknowledged the authority of Congress to prohibit employee discharge in order to protect union activity in Jones & Laughlin Steel Corp. v. NLRB, 301 U.S. 1 (1937), when it upheld the constitutionality of the anti-union discharge prohibitions in the Wagner Act (National Labor Relations Act, Act of July 5, 1935, codified at 29 U.S.C. §§ 151-168 (1982)). Even then, the Court's departure from the theory of mutuality and the right of an employer to terminate at will was qualified, as it cautioned that "the [National Labor Relations] Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than [employee] intimidation and coercion." *Id.* at 46.

15. *See* Feinman, *supra* note 11, at 131-35; Summers, *supra* note 11, at 484-86; Note, *Implied Contract Rights*, *supra* note 11, at 342-43, 346-47.

Courts and legislatures, however, have spent the past hundred years encroaching upon at will discharge, responding to the actual and potential abuses that at will employees have suffered at the hands of an employer free to discharge at will. There are abundant summaries of the congressional and state legislative "employee protection" statutes which prohibit the dismissal of an employee for specific unjust causes.[16]

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16. Federal legislation now extensively protects employees from termination through statutes prohibiting discharge for various unlawful causes. The National Labor Relations Act, 29 U.S.C. §§ 151-168 (1982), forbids discrimination, including discharge, based on an employee's union participation or membership, or in retaliation for bringing a claim authorized by the statute. *See supra* note 14. Section 703(a) of title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2)(a) (1982), bars any discharge based on race, color, religion, sex or national origin; section 704(a) (42 U.S.C. § 2000e-(3)(a) (1982)), similarly prohibits discharge for asserting claims under the Act. These two statutes represent the most significant federal encroachments on employer termination rights, and have given rise to a number of parallel statutory protections in more specific areas of congressional concern. The more significant of them are summarized below.

Section 304 of the Consumer Credit Protection Act, 15 U.S.C. § 1674(a)(1982), prohibits discharge because of wage garnishment for a single debt. Section 4(a) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a) (1982), prohibits discriminatory discharges of older workers. The Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1982), prohibits discrimination, including discharge from employment, solely because of pregnancy. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), forbids the exclusion or discharge of otherwise qualified handicapped workers. Section 6(a) of the Jury System Improvements Acts of 1978, 28 U.S.C. § 1875 (1982), disallows employers from discriminating against or discharging (permanent) employees who serve on federal juries. Once a civil service employee has successfully completed a probationary period of employment, the employee may be discharged "only for such cause as will promote the efficiency of the service" as set forth in the Civil Service Reform Act of 1978, § 204(a), 5 U.S.C. § 7513(a) (1982). And, though its provisions are now essentially outdated, the Vietnam era Veteran's Readjustment Assistance Act of 1974, 38 U.S.C. §§ 2021-2026 (1982) required the reemployment and prohibited the discharge without cause of honorably discharged Vietnam veterans.

Various federal statutes adopted the antiretaliatory approach of the labor and civil rights legislation statutes, by prohibiting the discharge of employees for exercising their statutory rights. Among these are the Occupational Health and Safety Act of 1970, 29 U.S.C. § 660(c) (1982); the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (1982); the Federal Water Pollution Control Act, 33 U.S.C. § 1367(a) (1982); the Clean Air Act, 42 U.S.C. § 7622(a) (1982); and the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140 (1982).

Tracking employment at will at the state level is a bit more complicated, and reveals a hybrid of federal preemption, some statutory modelling after the various proscriptive federal provisions, and a great deal of judicial declaration where the state legislature has failed to act. Fair employment practice statues and human rights laws, fashioned after the federal labor and civil rights laws, are now widespread in the states. Like the federal counterparts, these statutes generally contain prohibitions against retaliatory discharge for employee activity in pursuit of the statutory rights involved. In addition, roughly three-fifths of the states now provide some additional antiretaliatory protection to employees, for such reasons as jury service, voting, wage garnishment, military service, or "whistleblowing," that is, reporting employer violations of a wide range of laws or regulations.

Numerous treatises have surveyed, catalogued, and summarized the wandering path of at will discharge throughout the states. For a thorough and complete analysis of state statutes protecting employees and modifying employment at will, see L. LARSON & P. BOROWSKY, UNJUST DISMISSAL §§ 10.01-.53 (1985); *see also* Annot., 12 A.L.R. 4th 544

Tracking the various state court interpretations of these statutes, or judicial response to the at will issue in states without comprehensive employee protection laws, is more troublesome. This tracking reveals the lack of any single judicial trend in defining the permissible boundaries of at will termination. A detailed survey of the state cases is necessarily beyond the scope of this Article.

State court review does reveal one singularly significant fact: while there is no longer any general common-law at will rule in the aftermath of a century of encroachment upon *Wood's Rule*, employment at will remains a qualified but legitimate term of employment in all of the states, and in federal employment law.[17] Judicial and legislative attention to the question at the state level has expanded the dif-

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(1982).

17. For a state-by-state analysis of termination at will cases, see L. LARSON & P. BOROWSKY, *supra* note 16, §§ 3.01-4.10; H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE 121-218 (1984); 115 L.R.R.M. (BNA) §§ 170.501-.690 (1984).

A survey of the cases reveals that termination at will shares some definitional and theoretical common ground in the states, and that California faithfully reflects those common elements. First, there is the model of the terminable at will relationship: a contractual agreement between employer and worker which either specifies, or is subject to the reasonable implication, that the employee may be dismissed for any reason.

Where no statute *expressly* prohibits such a dismissal, the case law in the states suggests three general theories of liability for wrongful discharge emerging to protect the employee despite inexplicit or nonexistent legislative protection. The first theory of liability recognizes that the employee has been damaged because the employer has violated public policy — not an express prohibition against discharge, but some more fundamental, implied standard of contractual behavior — and should make reparation for the harm done. This is the "public policy" exception to an otherwise permissible at will relationship.

The second theory establishes liability based upon a showing that the parties "contracted out" of an arguably permissible at will relationship, into a modified relationship that now cannot be terminated except for cause. Alternatively, the employee may be held to have justifiably believed this has occurred, and reasonably relied on that belief to his subsequent detriment. This theory is generally recognized as a contract analysis, although malicious or wrongful behavior by the employer can be the basis of concurrent or independent tort liability.

Finally, a theory has developed recognizing an employer's independent covenant of good faith and fair dealing in the employment relationship, created either by statute or judicial inference. The breach of this covenant has been recognized as both a tort and contract issue, and is an independent, more general basis for wrongful discharge liability.

For a more extensive discussion of the use in California of these three theories of liability, see *infra* notes 20-101 and accompanying text.

Two corollary trends in the states are also worth noting. First, in no jurisdiction is there a clear, absolute statutory prohibition against termination at will. By either statute or case law, some accomodation of the doctrine exists in every state.

Just as significantly, the other extreme does not apply. No state has accepted unconditionally, and without restriction, the premise that an employer should be authorized to discharge an employer for any cause or no cause. Every state, either through judicial opinion or legislation, has developed some exceptions to the doctrine resulting in the employer's liability to civil suit or criminal prosecution.

ferences between various state versions of at will employment, but the doctrine's national demise continues to be greatly exaggerated.

California Labor Code Section 2922 and the Development of Public Policy Exceptions

California courts have long been at the forefront of the trend toward expanding wrongful discharge liability, and limiting the employer's right to terminate an employee at will. California's active history of employee protection is curious and specially significant in light of its unique at will statute, Labor Code section 2922.[18] Section 2922 defines, authorizes, and in the absence of a contract term to the contrary, presumes an employment relationship to be terminable at will. Notwithstanding the unambiguous language and clear intent of the statute, its application in questions of at will discharge has never been absolute. The California Legislature has expressly prohibited the dismissal of employees for a number of specific unlawful causes,[19] and the state courts have routinely applied these statutory prohibitions to at will employees without regard to section 2922.[20] At the same time, the case law has imposed a series of additional exceptions to the rule, based upon judicial interpretation of a general public policy implied by various statutes.[21] Thus, the history of at will employee discharge in California has become progressively more complicated, and the state of the law progressively more obscure, as

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18. CAL. LAB. CODE § 2922 (West Supp. 1986); *see also supra* note 7. Five states other than California recognize the at will rule by statute: Georgia, Louisiana, Montana, North Dakota, and South Dakota. The effect of the statutes varies, but nowhere is state legislation permitting at will discharge as subject to exception and qualification as in California.

19. California has prohibited employee discharge in numerous provisions of the Labor Code, as well as in other codes, and the courts have interpreted the statutes to apply to the at will employee. As recognized by the supreme court in Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980), the list of prohibited causes now includes discharge for refusal to commit perjury, Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); discharge because of union membership and activity, Glenn v. Clearman's Golden Cock Inn, 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961); and discharge for designation of a nonunion bargaining representative, Montalvo v. Zamora, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970). *See infra* notes 38-44 and accompanying text.

A court of appeal decision in Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980), additionally recognized the following statutory prohibitions: discharge for seeking or exercising rights to safe working conditions (Mason v. Lyl Productions, 69 Cal. 2d 79, 443 P.2d 193, 69 Cal. Rptr. 769 (1968) (citing CAL. LAB. CODE § 6311 (West Supp. 1986)); for asserting certain civil rights, including participation in elections and service as a juror (CAL. LAB. CODE §§ 1101, 230 (West Supp. 1986); CAL. ELEC. CODE § 1650 (West Supp. 1986)); for garnishment of wages (CAL. LAB. CODE § 2929 (West Supp. 1986)); for seeking the protection of minimum wage laws for women and minors (CAL. LAB. CODE § 1197 (West Supp. 1986)); and to prevent age discrmination (CAL. LAB. CODE §§ 1420.1, 1420.15 (West Supp. 1986)).

20. *See infra* notes 22-37 and accompanying text.

21. *See infra* notes 38-99 and accompanying text.

judicial exceptions to and qualifications of section 2922 have redefined and progressively eroded the once clear meaning of the statute.

In a series of cases beginning in 1949, California courts effectively abolished the distinction between at will employees and those hired for a specific term, where employee protection legislation prohibited discharge for specific causes. In 1949, a court of appeal in the case of *Kouff v. Bethlehem-Alameda Shipyard*[22] interpreted Election Code section 695[23] to be equally applicable to term and at will employees. The court saw no conflict between the Election Code provision, which prohibited employers from suspending or firing employees for missing work to serve as election officers, and section 2922 of the Labor Code, which allowed the discharge of at will employees for *any* reason. It thus established the election provision as a deliberate exception to the general rule of at-will dismissal.[24] The court reasoned that "[n]o reason is advanced by respondents [Shipyards], and none suggests itself, why an employee for a specified term should be protected, while an employee at will should not be."[25]

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22. 90 Cal. App. 2d 322, 202 P.2d 1059 (1949).

Kouff, though he had worked for the Shipyard for more than a year, was recognized as a terminable at will employee. He did not contest this characterization, arguing rather that the protections of the Election Code applied to at will employees.

23. CAL. ELEC. CODE § 695 (West 1975) (current version at CAL. ELEC. CODE § 1655 (West. Supp. 1986)). The original statute read in part:

> Any election officer may, on the day of an election at which he is serving, absent himself from any service or employment in which he is then engaged or employed. He shall not, because of so absenting himself, be liable to any penalty, nor shall any deduction be made made from his usual salary or wages, nor shall he be suspended or discharged from his service or employment.

24. The court stated, "[g]ranting that under the general law an employee at will may be discharged without any cause, this particular statute interposes an exception to that rule, the basis of which is the necessity of drawing on industry for such temporary public servants as election officers." *Kouff*, 90 Cal. App. 2d at 325, 202 P.2d at 1061. On that basis, the court allowed Kouff a damage recovery for lost wages and punitive damages. *Id.*

25. *Id.* The court correctly noted that the Shipyard failed to provide an equitable argument sufficient to support a distinction between its term and at will employees. Nevertheless, its reading is the simplest, clearest, least ambiguous interpretation of section 695, and one that did not seem to *require* equitable support. The statute does not distinguish between types of employees. However, it does refer to the worker's "usual salary or wages," implying that the provision applies to those employees for whom the term "usual wage" would be meaningful. This would certainly include term employees. As for the temporary or short-term worker, the term is not so obviously applicable.

The court's holding might alternatively have focused on whether Kouff, though dismissible at will, had worked long enough to be recognized as earning a usual salary or wage. That analysis would have brought him within the purview of the statute, as well as presaging the California Supreme Court's approach thirty-one years later in Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980). *See infra* notes 38-44 and accompanying text.

The significance of the *Kouff* decision cannot be understated. It represented the first time a court had abandoned the clear and absolute meaning of section 2922, in favor of a specific definition of the "public good" in a worker protection statute. Once the court characterized the case as posing an "either-or" choice between allowing a malicious dismissal, or extending arguably applicable statutory protection to an abused worker, its choice to support the public policy behind the statute was predictable. The *Kouff* case invited at will employees into the zones of protection created by all similar employee protection statutes.[26]

Just as significantly, *Kouff* introduced the concept that the em-

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In any case, the court failed to discuss or account for the clear language of CAL. LAB. CODE § 2922, which *does* distinguish between the terminable at will employee and one employed for a specified term. Section 2922, applied to *Kouff*, suggests that if Kouff was an at will employee, he was terminable at will; if not, he was protected under section 695 of the Election Code. The court of appeal cited no authority to support its conclusion that CAL. ELEC. CODE § 695 was intended as an exception to the at will rule, and neither legislative history nor the case law substantiates its peculiar declaration that section 2922 was to be qualified and preempted by such worker protection statutes. *See infra* note 33.

26. Reconciling section 2922 with section 695 of the Election Code, or with similar no-discharge laws, could have taken several less strained interpretive paths. Any of the alternatives would have retained the integrity of section 2922, rather than virtually voiding it.

The simplest approach would have been simply to read section 2922 strictly, as applying to a specially defined category of at will employees for whom an employer's freedom to discharge would remain absolute. Employees contractually promised a term of employment would constitute as a discrete and separate class of worker, subject to different equitable expectations from at will employees and to separate statutory attention and protection.

So interpreted, section 2922 would be limited in its application to employees hire for an indefinite employment term. Statutes prohibiting discharge, by contrast, would apply to permanent or term employees. In cases in which an employee protection statute made no distinction between the at will and definite term employee, the presence of section 2922 would establish a predecessory rule regarding the at will worker. The election code provision at issue in *Kouff* did not except at will employees explicitly from the preexisting at will statute, and it is difficult to recognize any such exception as implied. It is even more difficult to accept the court's reasoning that an employer should be responsible for showing why it should not be implied.

Alternatively, a court considering whether to protect at will employees from discharge notwithstanding section 2922 could simply presume than a worker was an employee for a specified term, absent explicit contract language defining the employee's status as at will. This approach would require an employer to clarify the termination provisions in its employment agreements with workers, at the peril of having ambiguous terms resolved in the employee's favor. In order to protect clearly defined at will employees from discharge for reasons recognized as inimical to public policy, the legislature would be required to include them specifically in future employee protection statutes. Otherwise, the explicit distinction between term and at will employees would result in limited application of such status.

Kouff's termination would have been deemed lawful under either of these analyses. In the aftermath of the court of appeal's curious and contrary approach, they have been neglected. However, they remain reasonable alternatives for resolving the question of how far the protections of an ambiguous unlawful discharge statute should extend. Meanwhile, the ambiguity first addressed in *Kouff* remains, since neither section 2922 nor the California employee protection statutes have ever clarified the term "employee," or otherwise specified who should be subject to, or protected from, discharge at will.

ployer should bear the burden of developing a public policy argument to overcome the presumption of at will employee protection, at the peril of losing whatever discharge rights section 2922 provided. Thus, termination at will had been demoted from the status of a statutory right, to a mere policy which if not justified would be summarily disallowed in the face of any employee protection statute. Subjected to such a public policy balancing test, section 2922 was a marginal and unreliable source of protection for at will termination.

Ten years later, another California appellate court significantly extended the *Kouff* approach. In *Petermann v. International Brotherhood of Teamsters*[27] the court applied *Kouff's* public policy emphasis in an at will termination involving much less specific public policy directives. Petermann alleged that he had been fired in retaliation for disobeying his union's orders to commit perjury before a state legislative committee.[28] No statute specifically prohibited the union from discharging an employee for appearing before such a forum, or for failing to comply with its directive.[29] In the absence of such a law, the union contended that Petermann could be discharged without inquiry or justification as to cause.[30]

The court disagreed, holding that there prevailed a public policy against perjury superior to whatever public policy at will termination

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27. 174 Cal. App. 2d 184, 344 P.2d 25 (1959). The trial court applied section 2922 in routine fashion, sustaining the union's demurrer on the basis of its right to discharge Petermann for any reason.

28. Petermann was subpoenaed to testify before the Assembly Interim Committee on Governmental Efficiency and Economy of the California Legislature, and alleged that he was ordered by a union official to make false statements in his testimony before the committee. He refused, and was discharged the day after testifying. *Id.* at 187, 344 P.2d at 26.

29. In fact, a 1937 California statute *does* come close to providing a specific statutory prohibition against Petermann's perjury. Section 2856 of the Labor Code provides that "[a]n employee shall substantially comply with all the directions of his employer concerning the service on which he is engaged, *except where such obedience is impossible or unlawful*, or would impose new and unreasonable burdens upon the employee." CAL. LAB. CODE § 2856 (West 1975) (emphasis added).

This provision does not make it illegal to discharge an employee for refusing to perform unlawful activities (such as perjury), but it does suggest that an employee could refuse to perform them and still remain faithful to his contractual duties to his employer. The court, while noting section 2856, did not rely upon it in its public policy analysis. *See infra* note 41; *see also* Crossen v. Foremost McKesson, Inc., 537 F. Supp. 1076 (N.D. Cal. 1982) (federal court cited CAL. LAB. CODE § 2856 to support public policy prohibition against employee discharge).

30. The court of appeal noted that Petermann was subject to an employment contract "which does not contain any fixed period of duration. Generally, such a relationship is terminable at the will of either party for any reason whatsoever . . . ." *Petermann*, 174 Cal. App. 2d at 188, 344 P.2d at 27 (citations omitted).

and section 2922 embodied.[31] The court recognized the difficulty of defining public policy, and the problems in translating it into a recognizable rule for employers to follow in discharging at will employees.[32] Nevertheless, it found that the public policy against perjury[33] and the solicitation of perjury[34] clearly prohibited the particular discharge in this case.[35]

In the tradition of *Kouff*, the court had extended protection to an at will employee previously recognized as having none. But *Petermann* went much further, extending protection where no employee had previously been recognized as having any, based upon an implied, rather than an explicit, prohibition against discharge.

As *Kouff* and *Petermann* framed the issue, an employee's discharge was always a question of social policy, subject to a balancing of competing social interests. Section 2922 was endlessly qualified, subject to restriction or outright exception whenever disallowing an at will employee's termination served a superior policy. The cases adopting the *Petermann* rationale revealed just how inferior the right to terminate was when pitted against competing policy derived from the statutes.[36]

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31. The court announced its reliance on public policy casually and without authority, simply stating that "the right to discharge an employee under such a [terminable at will] contract may be limited by statute *or by considerations of public policy.*" *Id.* (citing CAL. ELEC. CODE § 695 and *Kouff*) (emphasis added).

32. Attempting to find a suitable definition, the court first explained that "[b]y 'public policy' *is intended that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good* . . . ." *Petermann*, 174 Cal. App. 2d at 188, 344 P.2d at 27 (quoting Safeway Stores v. Retail Clerks Int'l Ass'n, 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953)) (emphasis in original).

The court later set forth an even more general definition of public policy as "[w]hatever contravenes good morals or any established interests of society . . . ." *Petermann*, 174 Cal. App. 2d at 188, 344 P.2d at 27.

33. CAL. PENAL CODE § 118 (West Supp. 1986).

34. *Id.* § 653f.

35. *See Petermann*, 174 Cal. App. 2d at 188-89, 344 P.2d at 27:

> It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, *whether the employment be for a designated or unspecified duration*, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute.

Id. (emphasis added).

36. *See supra* note 19 and accompanying text. Still, standing alone these exceptions to section 2922 and the at will rule encroach only marginally on an employer's right to dismiss at will employees. As the most inferior of statutory mandates, section 2922 still emerges — qualified, but valid — in situations in which there is no competing statute.

In fact, at least one case suggests that section 2922 is not presumptively inferior to all such statutes. In Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960), a court of appeal upheld a trial court finding that an employer did not act unlawfully in discharging an at will employee for notifying the local court that she was willing to serve as a trial juror. The court deferred to the legislature as the proper forum to consider and decide the permissibility of such discharges as a matter of public policy.

Although suggesting a fairly coherent, limited methodology for qualifying the absolute freedom to discharge at will, the *Petermann* and *Kouff* tandem provided unpredictable results. The state's statutes explicitly and implicitly defined certain unjust or immoral causes — causes that courts would refuse to allow as the reason for an employee's termination, even when the employee was otherwise terminable at will. In 1980 the California Supreme Court destroyed whatever fragile balance between employee discharge and protection this approach offered, expanding the public policy inquiry well past *Kouff* and *Petermann's* statutory linchpin.[37]

Expansion of the Public Policy Doctrine: The Covenant of Good Faith

Tameny v. Atlantic Richfield Co.[38] is the California Supreme Court's most significant decision in the law of termination at will. The court rejected the more restrained approach of the courts of appeal in *Kouff* and *Petermann.* Rather, it based its decision on consid-

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The court's restraint, and its treatment of unlawful discharge as an essentially legislative question, contrast dramatically with the *Petermann* court's more ambitious attempt to define public policy. Responding to plaintiff's argument that the employer's termination was unlawful and therefore should be recognized as a breach of contract, the court in *Mallard* stated:

> Although we may feel that this would be good public policy, to so hold would establish a rule which would apply in all instances where persons are discharged from their employment because they have made themselves available for jury service, regardless of the circumstances. If public policy requires that the protection should be afforded prospective jurors, we feel it should be done by the Legislature as they have done in the case of election officials.

Id. at 396, 6 Cal. Rptr. at 175. The legislature responded to the court's invitation in 1968, enacting a statute which overruled the decision. *See supra* note 19 and accompanying text; *see also* Becket v. Welton Becket & Assocs., 39 Cal. App. 3d 815, 114 Cal. Rptr. 531 (1974) (no wrongful discharge cause of action for employee of a corporation, fired after bringing suit for corporate mismanagement against employer on behalf of an estate for which employee was co-executor).

37. The *Petermann* public policy analysis became a model for other states seeking a formula for limiting at will termination where no statute expressly prohibited the discharge. Statutes adopting its approach in looking for public policy implied by statute include: Michigan (Trombetta v. Detroit, T. & I.R.R., 81 Mich. App. 489, 265 N.W.2d 385 (1978)); Connecticut (Sheets v. Teddy's Frosted Foods, 179 Conn. 471, 427 A.2d 385 (1980)); Illinois (Palmateer v. International Harvester, 85 Ill. 2d 124, 421 N.E.2d 876 (1981)); Oregon (Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975)); and West Virginia (Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978)). The last two of these decisions played an important part in the California Supreme Court's further expansion of the *Petermann* rule in Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980). *See infra* note 43 and accompanying text.

38. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

erations of public policy, while refusing to rely upon or be bound by the statute books in determining policy mandates. Further, the court recognized wrongful discharge as sounding in tort as well as contract, while *Petermann* considered only contract liability. Most significantly, it deemed employment contracts subject to an implied covenant of good faith and fair dealing, the violation of which constituted an independent ground for liability.

Tameny alleged that he had been fired for refusing to participate in his employer's price-fixing scheme.[39] He sought damages under several theories of liability including an action for wrongful discharge premised upon the *Petermann* public policy exception to permissible at will termination.[40] The court not only agreed,[41] but upheld Tameny's further contention that tort, as well as contract, damages should be awarded in the wake of a discharge inimical to

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39. *Id.* at 167, 610 P.2d at 1331, 164 Cal. Rptr. at 840. Tameny, as a sales representative for Arco, was pressured to participate in Arco's conspiracy to fix the retail price of gasoline at Arco service stations. He alleged that he was fired for refusing to "threaten and cajole" service station dealers to cooperate in the price-fixing scheme. *Id.*

40. 27 Cal. 3d at 171, 610 P.2d at 1332, 164 Cal. Rptr. at 841. Tameny sought damages from Arco under several theories, based upon his contention that he was fired for refusing to break the law by participating in an antitrust scheme specifically prohibited by statute in the Cartwright Antitrust Act, CAL. BUS. AND PROF. CODE §§ 16700-16758 (West 1969). His complaint included a treble damage action under the Cartwright Act; a breach of contract claim premised upon an implied covenant of good faith and fair dealing; a tort action alleging interference by Arco with his contractual relations; and a claim of "wrongful discharge" not nominated as lying in tort or contract but based upon the holding in *Petermann.*

The trial court upheld Arco's demurrer on all counts except the implied covenant breach of contract claim. Tameny dismissed the contract claim in order to preserve the case in its entirety on appeal. *Id.* The supreme court addressed Tameny's claims for breach of the implied covenant of good faith, interference with contractual relations, and wrongful discharge.

41. The court quoted *Petermann* at length, emphasizing the similarities between the two cases and noting that *Petermann* "imposes a significant condition on the employer's broad power of dismissal by nullifying the right to discharge because an employee refuses to perform an unlawful act." *Tameny*, 27 Cal. 3d at 173, 610 P.2d at 1333, 164 Cal. Rptr. at 842. The court summarized *Petermann* as establishing the rule that:

> [e]ven in the absence of an explicit statutory provision prohibiting the discharge of a worker . . . *fundamental principles of public policy* and adherence to the objectives underlying the state's penal statutes require the recognition of a rule barring an employer from discharging an employee who has simply complied with his legal duty and has refused to commit an illegal act.

Id. at 174, 610 P.2d at 1333-34, 164 Cal. Rptr. at 842-43 (emphasis added).

The supreme court questioned the failure of the court of appeal in *Petermann* to buttress its decision with CAL. LAB. CODE § 2856 (West 1975). *See supra* note 29 and accompanying text. The high court stressed that section's declaration that "[a]n employee shall substantially comply with all the directions of his employer concerning the service on which he is engaged, *except where such obedience is impossible or unlawful* . . . ." 27 Cal. 3d at 174 n.8, 610 P.2d at 1334 n.8, 164 Cal. Rptr. at 843 n.8. (emphasis in original). The court recognized the statute as reflecting "direct legislative approval of the basic proposition that an employer enjoys no authority to direct an employee to engage in unlawful conduct." *Id.*

public policy.[42] Citing *Kouff*, several California insurance cases, and a select group of out-of-state opinions, the court ruled that the public policy balancing formula in *Petermann* should apply to much less defined policy interests than those the *Petermann* court had relied upon.[43] The court thus distilled the single most volatile element from the *Petermann* wrongful discharge formula — its holding that public policy controlled in determining whether an employee discharge was permissible or wrongful. It dispensed with the statutory constraints the court of appeal had carefully recognized in defining public policy, minimal as those constraints may have been, and added tort liability to the resulting formulation.

Lastly, the court in a now-famous footnote observed that Arco had violated a "covenant of good faith and fair dealing" which, it announced, independently applied to this and all employment agreements.[44] It did not discuss Arco's liability under this theory. Never-

42. The trial court had found that Tameny's pleadings plainly asserted a cause for breach of contract, but sustained Arco's demurrer to the extent that it sounded in tort. 27 Cal. 3d at 169, 610 P.2d at 1331, 164 Cal. Rptr. at 840. *Petermann* certainly supported this holding, since the claim there had sounded in contract alone and recognized damages based upon the union's breach of an implied *contractual* duty not to fire someone for testifying before a legislative committee. Nevertheless, the supreme court concluded that "the relevant authorities both in California and throughout the country establish that when an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." *Id.* at 170, 610 P.2d at 1331, 164 Cal. Rptr. at 640.

43. The court relied heavily on two out-of-state opinions that had recently cited *Petermann*: Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975), and Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978). Though both cases recognized public policy as qualifying the right to discharge, neither state court adopted Petermann's critical thesis that the place to *find* public policy lay in the state statutes.

Thus in *Nees*, the Oregon Supreme Court found that discharging an employee for performing jury duty was a "socially undesirable motive [for which] the employer must respond in damages," *Nees*, 272 Or. at 218, 536 P.2d at 515, without basing its finding of "social undesirability" in any statute. In *Harless*, a bank employee was discharged for disclosing to auditors certain illegal overcharges collected by his employer. The West Virginia Supreme Court of Appeals, deeming it unnecessary to cite any statutory basis for its analysis, declared that *any* termination is unlawful if it "contravene[d] some substantial public policy principle . . . ." *Harless*, 162 W. Va. at 124, 246 S.E.2d at 275. Nowhere did the West Virginia court suggest how or where to find these principles.

The *Tameny* decision therefore essentially rested upon two cases, drawn from out-of-state jurisdictions, in which employee plaintiffs had prevailed in wrongful discharge litigation based upon a showing far less specific than what had been required in California. *Nees* and *Harless*, the court nevertheless contended, were "merely illustrative of a rapidly growing number of cases throughout the country that in recent years have recognized a common law tort action for wrongful discharge in which the termination contravenes public policy." *Tameny*, 27 Cal. 3d at 178, 610 P.2d at 1336, 164 Cal. Rptr. at 845.

44. Conceding that consideration of the question was unnecessary, the court pro-

theless, its recognition of the covenant underscored the court's expansive thesis that public policy, recognized in even as undefined a tenet as "good faith and fair dealing," would govern the propriety of employee dismissal in California. No longer would lower courts need refer to the statutes. Moreover, the full measure of both tort and contract recovery were made available to the wrongfully discharged employee.

The breadth of the *Tameny* opinion — its intentional departure from the *Petermann* prerequisite that public policy have a statutory grounding, and the implications arising out of its implied covenant discussion — virtually ensured its inconsistent application. *Cleary v. American Airlines, Inc.*[45] and *Pugh v. See's Candies, Inc.*,[46] two court of appeal opinions issued soon after *Tameny*, appropriately highlighted *Tameny's* doctrinal vagueness and the implications for lower courts addressing wrongful discharge claims.

Cleary represented the first attempt by an appellate court to apply the *Tameny* doctrine, an attempt with disturbing results. Cleary, discharged after eighteen years of continuous employment with American, alleged his termination was in retaliation for his union activities. His complaint sounded in both tort and contract, seeking both compensatory and punitive damages.[47]

The court's opinion was a six-part, wandering foray into the California case law and statutes that ultimately applied *Tameny* in finding American liable in both tort and contract for breach of the implied covenant of good faith and fair dealing. The court failed to acknowledge Cleary's argument of retaliatory anti-union discharge — a theory strongly supported by case precedent pointing to American's liability.[48] The court ignored Cleary's retaliatory discharge

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ceeded to consider it anyway in announcing that "authorities in other jurisdictions have on occasion found an employer's discharge of an at-will employee violative of the employer's 'good faith and fair dealing' obligations . . . and past California cases have held that a breach of this implied-at-law covenant sounds in tort as well as in contract." *Id.* at 179 n.12, 610 P.2d at 1337 n.12, 164 Cal. Rptr. at 846 n.12. The court cited a line of insurance cases which, as with the line of cases supporting its declaration of tort liability, were clearly distinguishable from the facts of *Tameny* and involved a special fiduciary contract relationship. It also cited a group of less than compelling out-of-state cases to support its argument. *See infra* notes 50 & 75 and accompanying text.

45. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

46. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

47. The court of appeal considered the trial court's decision on Cleary's fifth amended complaint — amendments at least in part attributable to the issuance of the *Tameny* decision. One of Cleary's causes alleged the breach of an oral contract — what the court of appeals labelled as his "wrongful discharge" action. In addition, he sought liability under the tort theories of wrongful interference with a business relationship, and wrongful inducement of breach of contract. The trial court sustained American's demurrers on all counts, and dismissed. *Cleary*, 111 Cal. App. 3d at 446, 168 Cal. Rptr. at 723-24.

48. American alleged facts to support Cleary's discharge for cause, claiming his involvement in alleged thefts and his poor work record. It further contended that Cleary

claim, which easily satisfied the *Petermann* test for wrongful discharge,[49] and according to *Tameny* justified the award of tort as well as contract damages.

Rather, the court found liability based solely on American's violation of the "implied covenant of good faith and fair dealing in *every* contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement."[50] What the supreme court had earlier noted in dicta,[51] the *Cleary* court of appeal now elevated to the level of doctrine, and substituted for the true holding in *Tameny*.

Equally disturbing was the court's selective reliance on two factors in the history of the relationship between the parties — factors that

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was an at will employee, terminable without regard to cause. *Id.* at 447, 168 Cal. Rptr. at 724.

The case is therefore distinguishable from many of the previous at will termination cases in that the employer raised a defense of just cause on the facts, as well as asserting its authority to dismiss the employee at will and without cause. In fact, the notion of "terminable at will" had already become a misnomer, since specific statutory prohibitions and the *Petermann* public policy exceptions had created a significant number of causes for which a terminable at will employee could not be terminated.

The court of appeal noted the case of Glenn v. Clearman's Golden Cock Inn, 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961), but failed to cite it as controlling despite its holding that an employer could not discharge an at will employee for participating in union activities. *Cleary*, 111 Cal. App. 3d at 450, 168 Cal. Rptr. at 726. *See supra* note 19.

49. The *Petermann* analysis required that the court of appeal determine the lawfulness of Cleary's discharge by balancing his right to participate in union activities, as set forth in CAL. LAB. CODE §§ 1101-1102 (West Supp. 1986), against American's right and interest in terminating him without cause. That analysis clearly supported a finding of wrongful discharge, without need for further reference to or reliance upon the *Glenn* decision.

50. *Cleary*, 111 Cal. App. 3d at 453, 168 Cal. Rptr. at 728 (quoting Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 658, 328 P.2d 198 (1958)) (emphasis added by the court). The court of appeal adopted *Tameny's* approach, in reasoning that the good faith and fair dealing covenant derived from the special fiduciary nature of the insurance contract. However, the court interpreted *Comunale* itself as extending the good faith covenant to all contractual agreements, and not simply to insurance contracts.

Even accepting this curious reading of *Comunale*, the court's argument suggests that these duties should derive from the contract itself, rather than from notions of public policy expressed or implied by statute. Such implicitly contractual duties, if breached, would give rise to a breach of contract rather than a tort cause of action.

The court of appeal never clarified those implications. Instead, it declared the duty to deal fairly and in good faith as "unconditional and independent in nature" and cited *Tameny* in concluding that "an employee's action for wrongful discharge is founded in tort as well as in contract, and . . . the employer may be subject to liability for both compensatory and punitive damages." *Cleary*, 111 Cal. App. 3d at 453-54, 168 Cal. Rptr. at 728.

51. *Tameny*, 27 Cal. 3d at 179 n.12, 610 P.2d at 1337 n.12, 164 Cal. Rptr. at 846 n.12.

it found simultaneously indicated American's understanding of the good faith covenant, and that proved its breach in discharging Cleary. The first of these two factors was Cleary's eighteen years of service prior to his discharge, which the court characterized as of "paramount importance."[52] The second, which the court deemed of considerable significance, involved American's use of written guidelines governing employee discipline, including procedures available for employees to dispute company-imposed sanctions.[53]

Cleary left a wake in which it was virtually impossible to predict whether an at will or term employee's discharge was wrongful. The court avoided any weighing of the policies for and against discharge; whether the employer had acted in good faith and fairly was the single determinative liability issue. *Cleary's* application of the *Tameny* doctrine made permissible termination at will difficult to identify, and impossible to rely upon. It suggested that only short-term employment devoid of internal guidelines, manuals or policies for discharge could safely be terminated without good cause.

The following year another court of appeal handed down *Pugh v. See's Candies, Inc.*,[54] a more faithful and sophisticated attempt to apply *Tameny*. It contradicted *Cleary* outright, and illustrated the problems inherent in the broad-brushed public policy analysis that lower courts were invited to apply in *Tameny's* wake.

Pugh was discharged without explanation in 1973, after a successful thirty-two year career at See's throughout which he had received positive evaluations, and continuous promotion.[55] Pugh produced evidence that his dismissal resulted from his opposition to an unfair pay scale arrangement See's management had proposed to its employee labor union.[56] See's defended solely on the ground that Pugh's at will

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52. *Cleary*, 111 Cal. App. 3d at 455, 168 Cal. Rptr. at 729. The court reasoned that:

> [t]ermination of employment without legal cause after such a period of time offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts. As a result of this covenant, a duty arose on the part of the employer . . . to do nothing which would deprive . . . the employee, of the benefits of [that] employment [alone] . . . .

Id.

53. The court saw such internal policies as evidence of American's conscious adherence to the covenant of good faith and fair dealing, and proof that it had waived any contractual right it might otherwise have been able to maintain to discharge Cleary at will. It reasoned that the presence of such internal regulations "[compels] the conclusion [American] had recognized its responsibility to engage in good faith and fair dealing rather than in arbitrary conduct . . . ." *Id.*

54. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

55. *Pugh*, 116 Cal. App. 3d at 316-17, 171 Cal. Rptr. at 918-19. At the time of his dismissal Pugh directed one of See's subsidiary companies. The year before his dismissal, he had been given the customary gold watch by See's management "in appreciation of 31 years of loyal service." *Id.*

56. *Id.* at 318-19, 171 Cal. Rptr. at 920. Pugh implicated both management and the See's employee union, alleging that his discharge resulted from his objections to a

status made him terminable without cause.[57]

The court carefully inquired into, and specifically rejected, Pugh's three statute-based claims of wrongful discharge,[58] which virtually recited the *Cleary* declarations of what constituted wrongful discharge. Rather, the court examined the history of the relationship between the parties. On that basis alone, the court concluded that "in traditional contract terms . . . the employer's conduct gave rise to an implied promise that it would not act arbitrarily in dealing with its employees."[59] Finding that Pugh had alleged sufficient facts to prove such "arbitrariness" by See's, the court reversed the trial court's dismissal, and remanded for trial on the merits.[60]

Pugh thus represented an extraordinary departure from the liberalizing trend that *Petermann* had introduced, and subsequent cases had continued to expand upon.[61] *Pugh*, in diametric opposition to the

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"sweetheart contract" between See's and the union. The court noted an excerpt from the trial transcript, in which Pugh's successor allegedly told union officials, "Now we've taken care of Mr. Pugh. What are you going to do for us." *Id. See infra* note 58.

57. See's made no attempt to justify Pugh's discharge, unlike American in the *Cleary* case. *See supra* note 48. Moreover, See's maintained no internal guidelines or policies for employee discipline.

58. Pugh alleged discharge in retaliation for his refusal to support management policies that violated restraint of trade and sexual discrimination laws. In addition, he claimed a statutory duty to oppose these policies pursuant to his fiduciary duties of inquiry as a corporate officer. The court of appeal carefully considered each of the three theories, all recognized as legitimate under the *Tameny* decision, but concluded that "appellant [Pugh] did not establish a prima facie and cognizable case of wrongful termination based upon the public policy theories he advanced." *Pugh*, 116 Cal. App. 3d at 324, 171 Cal. Rptr. at 924.

The court recognized Pugh's restraint of trade argument as falling squarely within the precedent and principle of *Tameny*, which it noted provided "doctrinal support." However, the court found that the negotiations in which Pugh had participated did not constitute antitrust violations, and thus could not constitute illegal activity. *Pugh*, 116 Cal. App. 3d at 323, 171 Cal. Rptr. at 923.

Pugh's second theory argued that the wage agreement he had opposed discriminated against women in violation of the Fair Employment Practices Act (now Fair Employment and Housing Act, CAL. GOV. CODE §§ 12900-12996). The court recognized the legitimacy of the theory, but once again held that Pugh had failed to establish facts to support it. It could not find a sufficient showing that Pugh had been discharged as a direct result of his objection to the wage agreement on discriminating grounds. *Id.*

Pugh's final argument was that he was required, as a corporate officer, to make the very inquiries for which he allegedly was discharged. The court held that Pugh had failed to show he had acted in the capacity of an "inquiring corporate director," as that term was used in the Corporations Code. CAL. CORP. CODE § 309(a) (West 1977), *cited in Pugh*, 116 Cal. App. 3d at 324, 171 Cal. Rptr. at 923-24.

59. *Pugh*, 116 Cal. App. 3d at 329, 171 Cal. Rptr. at 927.

60. *Id.* at 331, 171 Cal. Rptr. at 927-28.

61. However, it is noteworthy that the *Pugh* court's analysis would have yielded liability in both the *Petermann* and *Tameny* cases. Petermann successfully alleged that his discharge was specifically related to his refusal to perform a clearly illegal act of

Cleary case, was one court's attempt to confine the public policy exception to at will dismissal.

All the more remarkable, then, was its citation to *Cleary* in finding See's liable under the other of the two "limiting principles" which it recognized as disallowing termination at will, that is, "when the discharge is contrary to the terms of the statute, express or implied."[62] Ignoring *Cleary's* use of the covenant of good faith,[63] the *Pugh* court chose rather to recognize the "totality of the parties' relationship" as creating an implied contract promise that Pugh would not be terminated without good cause. The court looked to "the duration of the appellant's [Pugh's] employment, the commendations and promotions he received, the apparent lack of any direct criticism of his work, the assurances he was given, and the employer's acknowledged policies" as clear evidence of See's implied promise not to discharge Pugh arbitrarily.[64]

Pugh was a remarkably restrained application of *Tameny*. It carefully avoided expansive public policy declarations, and clearly rejected *Cleary's* odd variation on that theme. The case recognized a much more familiar covenant, that is, an implied promise not to discharge arbitrarily, which it conventionally derived from the conduct and reasonable understandings of the parties to the contract.[65] Good

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perjury. Likewise, Tameny could show that his termination was a direct response to his refusal to price-fix. However, neither of those opinions was as restrictive or specific as the court's standard in *Pugh* for establishing the facts necessary to support a public policy exception to the at will rule.

62. *Pugh*, 116 Cal. App. 3d at 322, 171 Cal. Rptr. at 922.

63. The court noted:

> If '[t]ermination of employment without legal cause [after 18 years of service] offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts,' as the court said in the above-quoted portion of *Cleary*, then *a fortiori* that covenant would provide protection to Pugh, whose employment is nearly twice that duration. Indeed, it seems difficult to defend termination of such a long-time employee arbitrarily, *i.e.*, without *some* legitimate reason, as compatible with either good faith or fair dealing.
>
> *We need not go that far, however.*

Id. at 328, 171 Cal. Rptr. at 927 (emphasis added).

In a following footnote, the court further noted "[n]or do we consider the implications of the good faith and fair dealing requirement with respect to an employer's obligation, if any, to provide procedural safeguards such as warning of intended discipline or opportunity for response to charges of misconduct." *Id.* at 329 n.25, 171 Cal. Rptr. at 927 n.25.

64. *Id.* at 329, 171 Cal. Rptr. at 927. The court noted that the plaintiff would have the burden of proof on this issue.

65. Alternatively, the case may illustrate the quasi-contractual notion that unwritten, inexplicit representations or conduct by an employer can create a reasonable implication, which the employee may infer and rely upon, that what once might have been temporary or "at will" employment has become a permanent employment which may only be ended for just cause.

Even this comparatively narrow analysis suggests a radical potential for modifying contracts. Theoretically, agreements explicitly terminable at will at their onset would be vulnerable to transformation by the "totality of subsequent circumstances" — perhaps

faith was a minor element in the court's analysis, serving merely as an initial assumption to make in determining what an employee should presume in the face of long, continuous, satisfactory service to an employer.[66]

More important than the decisional specifics of the two cases, however, was the fact that they could emerge from the same supreme court opinion. *Tameny* provided no formula or definition for discerning between the permissible and wrongful discharge. All *Tameny* really announced was the judicial authority to strike down a termination in the name of public policy. *Cleary* and *Pugh* represented one expansive and one restrictive attempt to give substance to that declaration. Neither decision, however, provided much insight or guidance in prospectively determining whether a particular employment relationship was terminable at will, or subject to a good cause discharge requirement.

The Trend After Pugh

Cases since the *Pugh* and *Cleary* decisions reveal erratic trends in the courts. There is a tendency to adopt the more constrained analysis of *Pugh*, rather than the *Cleary* implied covenant theory of liability. The trend, while noteworthy, only confirms the lack of authoritative guidance in the wrongful discharge area. It is still impossible to recognize or predict whether an employee discharge is wrongful; judicial response to litigation in the area continues to obscure, more than it does clarify, the bounds of permissible discharge.

Shapiro v. Wells Fargo Realty Advisors[67] is perhaps the most significant post-*Pugh* wrongful discharge decision for three reasons: 1) the court of appeal's carefully narrow summary of wrongful discharge law; 2) the court's refusal to recognize tort liability in at will termination; and 3) the strictness with which it analyzed the wrongful discharge pleadings in the case.

In *Shapiro*, the court considered a three-pronged wrongful dis-

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consisting of nothing more than employer friendliness, encouragement or approval — into something more permanent than either the employer or employee ever understood or intended it to be.

66. The deemphasis on good faith in *Pugh* also removed the component of tort liability that *Cleary* had reintroduced into wrongful discharge. Once again, the court of appeal did not so much take issue with *Cleary* as ignore it. The court's failure to recognize a tort cause in *Pugh* removed punitive damages from the case, however, and in so doing clearly lowered the liability ceiling that *Tameny* and *Cleary* had raised.

67. 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984).

charge action[68] brought by the vice-president of a realty company, discharged pursuant to the terms of a written agreement[69] which specified his terminability at will. Shapiro's three and one-half year term of employment before discharge was relatively short compared to the employment histories of employees Cleary and Pugh.[70]

However, Shapiro sought to prove other circumstances tending to show that the terminability issue had been modified, including company approval of his work, intimations of the permanence of his position, and the unfair, summary nature of his discharge without a forum for inquiry or response.[71] His case was therefore framed both within the "totality of circumstances" test of *Pugh*, and within the alleged deceptive conduct and false representations concerning job security deemed critical by both the *Cleary* and *Pugh* courts.

Nevertheless, the court of appeal allowed the demurrer on all counts, holding that Shapiro had not set forth facts sufficient to overcome the termination at will clause in his employment contract. The court's cautionary perspective in considering wrongful discharge was apparent from the outset. It undertook an historical analysis of the case law and selectively quoted *Tameny*:

> In a series of cases arising out of a variety of factual settings in which discharge *clearly violated an expressed statutory objective or undermined a firmly established principle of public policy*, courts have recognized that an employer's traditionally broad authority to discharge an at-will employee 'may be limited by statute . . . or by considerations of public policy.'[72]

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68. *Id.* at 473, 199 Cal. Rptr. at 615. Shapiro held the position of executive vice-president with Wells Fargo. He alleged termination without cause in breach of an implied-in-fact contract term that he would not be terminated without good cause; that his discharge was wrongful and malicious, giving rise to punitive damage liability in tort; and that Wells Fargo had independently breached the implied covenant of good faith and fair dealing, once again giving rise to punitive damages for willful concealment of fraudulent representations, and intentional denial of the opportunity to obtain the maximum benefits of his employment. *Id.*

69. A provision in the written "Stock Option Agreement" between the parties expressly reserved Wells Fargo's right to "discharge [Shapiro] at any time for any reason whatsoever, with or without good cause." The agreement expressly stated that it did not grant Shapiro "any right to continue in his employment." *Id.* at 474-75, 199 Cal. Rptr. at 616.

70. *Id.* at 473, 199 Cal. Rptr. at 615.

71. *See supra* note 68.

72. *Shapiro*, 152 Cal. App. 3d at 475, 199 Cal. Rptr. at 617 (citing *Tameny*, 27 Cal. 3d at 172, 610 P.2d at 1330, 164 Cal. Rptr. at 839) (emphasis added). Essentially, this is the *Petermann* standard revived. Its use as an introduction and premise for the court's opinion reinstituted a theme that had lost favor with the courts after *Tameny* — that is, that the statutory basis for public policy remained a threshhold question for parties arguing public policy, and that the employer's authority to discharge an at will employee remained an underlying right, subject to exception but not to outright denial.

The court characterized *Tameny* as representing but one of "three distinct theories" of wrongful discharge limiting the application of section 2922, the other two being separately articulated by the *Cleary* and *Pugh* courts. It then proceeded to deny liability under each of them. It summarized the different approaches as follows: (1) "a tort cause of action for wrongful discharge in violation of public policy" (*Tameny*); (2) "a cause of

The court peremptorily dismissed Shapiro's public policy claims, as he could cite no public policy to support his claim other than that California should promote job security and stability in the community.[73]

The court's treatment of Shapiro's *Cleary*-based claim was similarly brief, albeit a bit more subtle. Rather than attempt to summarize the case in a single sentence, as it had with *Tameny*, the court looked to the factors announced in *Cleary* —[74] that is, the longevity

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action for employer's breach of the implied covenant of good faith and fair dealing, which sounds both in tort and contract" (*Cleary*); and (3) "a cause of action for employer's breach of an implied-in-fact covenant to terminate only for good cause" (*Pugh*). *Shapiro*, 152 Cal. App. 3d at 475-76, 199 Cal. Rptr. at 617.

This is an attractive, coherent recapitulation of the history of the cases, which the court of appeals seemed to derive in part from the three-part structure of Shapiro's complaint, and in part from scholarship in the wrongful discharge area. It is also an oversimplification of the cases that goes beyond both the scope and factual contexts of *Cleary* and *Pugh* to create defined segregable theories where the courts there properly failed to see any.

It is noteworthy that the court's analysis closely resembles that of an earlier, uncited court of appeal decision in the case of Crosier v. United Postal Serv., 150 Cal. App. 3d 1132, 198 Cal. Rptr. 361 (1983). *See infra* notes 82-89 and accompanying text. Both courts evidently were adopting certain aspects of the "trilogy" thesis by Professors Miller and Estes in their 1982 law review article on the subject. *See* Miller & Estes, *Recent Judicial Limitations on the Right to Discharge: A California Trilogy*, 16 U.C. DAVIS L. REV. 65 (1982), *cited in Crosier*, 150 Cal. App. 3d at 1138 n.7, 198 Cal. Rptr. at 364 n.7; *Shapiro*, 152 Cal. App. 3d at 476 n.4, 199 Cal. Rptr. at 617 n.4. The simplicity of the thesis that *Tameny*, *Cleary* and *Pugh* create distinct and segregable causes of action, while subject to debate, has thus found its way into the case law and methodology of wrongful discharge.

73. 152 Cal. App. 3d at 477, 199 Cal. Rptr. at 618. The court stated that Shapiro's discharge involved no "*substantial policy principle*," citing and emphasizing the language of *Tameny*. *Id.* It further cited Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960), in support of the proposition that "courts have no power to declare public policy in wrongful discharge cases without statutory support." *See supra* note 36 and accompanying text.

The citation to *Mallard* is remarkable for several reasons. First, the court reverted to a pre-*Tameny* decision, when almost all recent wrongful discharge cases had looked to *Tameny* and the court of appeal cases refashioning it. *Mallard* based its liability analysis on the *Petermann* requirement that a discharge violate statutorily defined public policy; *Tameny* had expanded the realm of public policy beyond the statute books, and the courts of appeal had followed suit.

Finally, *Mallard* had long stood as the exception, rather than the rule, in applying the *Petermann* formula. In most of the cases courts easily found sufficient public policy to overturn an at will discharge. The *Mallard* court did not. *See supra* note 36 and accompanying text.

Shapiro thus represents a purposeful retreat from the *Tameny* thesis, and a revitalized, stricter application of the *Petermann* formula. The *Shapiro* court's subsequent rejection of the even more expansive *Cleary* covenant theory was thus predictable.

74. *Shapiro*, 152 Cal. App. 3d at 478, 199 Cal. Rptr. at 619. On their facts, *Shapiro* and *Cleary* were obviously distinguishable: Shapiro's length of employment failed to match Cleary's 32 years of service. Moreover, there was no dispute procedure

of the plaintiff's service, together with the expressed policy of the employer in providing specific procedures for resolving employee disputes. The court noted Shapiro's relatively short work history, and the lack of any suggestion that he, like plaintiff Cleary, had been denied access to company dispute procedures, and held that Shapiro had failed to allege facts sufficient to justify his claim under the *Cleary* liability formula.[75]

Shapiro's remaining claim was considered in the context of *Pugh*. The court accepted Shapiro's contention that factors other than job longevity could result in the modification of an otherwise permissible at will discharge. However, it then took particular note of the express at will term in the written contract between Shapiro and Wells Fargo, warning, "[t]here cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results."[76] With the written terms of agreement so emphasized, and *Pugh* so narrowly interpreted and strictly applied, the court's dismissal of Shapiro's breach of contract claim was almost perfunctory. In short, it concluded, as a matter of law, that Shapiro "was unable to rebut the presumption of his 'at-will' status."[77]

The approach in *Shapiro* is somewhat curious, but its conservatism is clear. The court of appeal refused *Cleary's* invitation to appropriate good faith and fair dealing, as an independent basis for employer liability, into the employment contract relationship.[78] It ac-

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denied to Shapiro, in contrast to the allegation in *Cleary* that American Airlines had failed to grant Cleary his full dispute rights. Finally, there was no contract in Cleary explicitly defining the employee as terminable at will.

75. In upholding the demurrer on the implied covenant count, the court deflated much of the *Cleary* good faith balloon. It questioned *Cleary's* implied covenant analysis outright, noting that although *Cleary* recognized "an implied covenant of good faith and fair dealing in every contract, the law with regard to the tort of bad faith breach of contract is well developed only in the insurance field." *Id.* (citation omitted). It thus undercut *Cleary's* fundamental contention that a fiduciary relationship analogous to the insurance agreement exists between all employers and employees, a relationship which superimposes upon their contractual relationship a duty of good faith that termination without cause inherently violates. This main thesis gone, *Cleary* is of no doctrinal value to an employee in Shapiro's situation.

The court of appeal also rejected the argument that breach of the implied covenant gave rise to an action in tort. Once again it simply rejected the insurance analogy upon which *Cleary* relied. It also distinguished *Shapiro's* pleadings from the principle non-insurance case applying the tort of bad faith breach. *Id.* at 478-79, 199 Cal. Rtpr. at 619 (citing Sawyer v. Bank of America, 83 Cal. App. 3d 135, 145 Cal. Rptr. 623 (1968)); *See* Diamond, *The Tort of Bad Faith Breach of Contract: When If At All, Should It Be Extended Beyond Insurance Transactions*, 64 MARQ. L. REV. 425 (1981), *cited in Shapiro*, 152 Cal. App. 3d at 479 n.7, 199 Cal. Rptr. at 419 n.7.

76. 152 Cal. App. 3d at 482, 199 Cal. Rptr. at 621-22 (citing Wal-Noon Corp. v. Hill, 45 Cal. App. 3d 605, 119 Cal. Rptr. 646 (1975)). *See* Crain v. Burroughs Corp., 560 F. Supp. 849 (C.D. Cal. 1983). *See infra* note 87 and accompanying text.

77. 152 Cal. App. 3d at 482, 199 Cal. Rptr. at 622.

78. While *Pugh* and most of the subsequent cases avoid the *Cleary* approach, no court before *Shapiro* had been so outright in recanting its teachings.

knowledged *Pugh*, but restricted its application and stressed the written agreement as determinative in the totality of the circumstances.[79] Finally, it represents litigation subjected to an exacting standard of pleading that will inevitably deny access to some meritorious employment cases.

The trends that *Shapiro* suggests appear in several other recent at will decisions. In 1983, a federal district court in California applied state law to uphold an explicit at will termination provision in an employment agreement, even where there were implications that the employer had represented otherwise to the employee. That case, *Crain v. Burroughs*,[80] applied *Pugh* in weighing the terms of a written employment agreement against an alleged oral promise of discharge for cause only. In finding for employer, Burroughs, the court did not recognize any overriding covenant of good faith sufficient to disallow termination at will.[81] The case confirms the vitality of at will dismissal, at least where the at will term is clearly agreed to and understood by the parties to the contract.

Crosier v. United Parcel Service[82] may be an even more significant holding. The court of appeal in *Crosier* upheld summary judgment for UPS, in a case in which the discharged employee alleged procedural unfairness and management unreasonableness constituting a breach of the implied covenant of good faith.[83] The court re-

79. Such attention to the written document subverts *Pugh*, suggesting that a written contract term providing for termination at will has presumptive superiority over contrary conduct or implications. The *Pugh* court, stressing as it did the totality of circumstances involved, would probably have been less impressed than the *Shapiro* court with a written at will termination clause. *Shapiro* and *Crain* together tend to limit *Pugh* and its "totality of circumstances" test to cases in which no written contract term specifies discharge rights. They thus suggest a method by which employers may erect a barrier to court consideration of the reasons for an employee's discharge.

80. 560 F. Supp. 849 (C.D. Cal. 1983).

81. *See id.* The court held that "Plaintiff [Crain] cannot avail herself of such California Court of Appeal cases [as *Cleary* and *Pugh*] because the extremely narrow circumstances under which those cases were decided are not present in Plaintiff's case." *Id.* at 853. The totality of circumstances cited by employee Crain was far less persuasive than that considered by the *Pugh* court; the court noted that "[a]t the time of [Crain's] termination, she had less than two years of employment with Burroughs and a less than satisfactory performance record . . . ." *Id.*

The court was also impressed by the express termination at will term in the written agreement between the parties, noting, as had the court of appeal in *Shapiro*, that Crain "may not rely on the terms of an implied contract . . . to contradict the terms of the written employment contract in effect at the time of her termination." *Id.* at 852 (citation to *Crossen* omitted).

82. 150 Cal. App. 3d 1132, 198 Cal. Rptr. 361 (1983).

83. *Id.* at 1134-35, 198 Cal. Rptr. at 362-63. Crosier alleged a breach of a contract containing a covenant of good faith and fair dealing; breach of the implied covenant

fused to interpret the covenant as granting employees the right to dispute or appeal employer sanctions, in a case seemingly full of equitable elements supporting liability under *Cleary's* implied covenant principles.[84]

Crosier's essential claim was that UPS' dismissal rules were unreasonable, and that his dismissal therefore was arbitrary per se.[85] The court, however, saw no implied contractual obligation that he be discharged only for good cause, refuting the *Pugh* court's footnoted proposition that a long-term, faithful employee might have a contractual *right* to some appeal forum for preventing employer arbitrariness.[86] The court refused to dismiss the relevancy of an employer's motives altogether, stating that the "implied in fact or implied in law promise to dismiss an employee only for cause would be illusory if the employer were permitted to be the sole judge and final arbiter of the propriety of the policy giving rise to the dis-

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independent of the contract; and wrongful interference with business relations (a cause abandoned before trial). UPS admitted the existence of the implied covenant for purposes of its motion for summary judgment, but alleged that as a matter of law it had not breached the covenant because Crosier's termination was for just cause.

84. Crosier had been employed by UPS for 25 years, and therefore could point to longevity in employment recognized as critical in both the *Pugh* and *Cleary* analyses. In addition, he had performed his job well. He had been promoted to a managerial position, and given routinely positive performance appraisals. Finally, neither the contract nor any other circumstances of his employment bore the explicit or continuous declarations of terminability that characterized the *Shapiro* and *Crain* cases. *Crosier*, 150 Cal. App. 3d at 1134-35, 198 Cal. Rptr. at 362-63.

The court deemed Crosier to be an at will employee, and treated the case as one "where an employer is allegedly in breach of an employment contract to retain an employee 'so long as his services are satisfactory.' " *Id.* at 1138, 198 Cal. Rptr. at 365. That the court could proceed to its conclusions without further attention to Crosier's employment status only highlights how blurred the distinction between at will and term employees has become in California.

85. Crosier was discharged after disclosure of his affair with another employee, in violation of a company nonfraternization policy. The court described the policy as an "unwritten rule proscribing social relationships between management and nonmanagement employees. The purposes of the rule are to avoid misunderstandings, complaints of favoritism and possible claims of sexual harassment." *Id.* at 1135, 198 Cal. Rptr. at 362.

The court was sympathetic to Crosier's unfairness claim, but just as sensitive to preserving the rights of UPS to terminate him absent demonstrably bad cause, or implied contract terms varying the presumed at will relationship:

> Crosier has a strong interest in the stability of his employment . . . . UPS, however, is legitimately concerned with appearances of favoritism, possible claims of sexual harassment and employee dissension . . . . UPS must be permitted ample latitude in disciplining its personnel. Crosier has not made a colorable claim that UPS failed to act in good faith toward him.

Id. at 1140, 198 Cal. Rptr. at 366.

86. The court found no merit in Crosier's theory that the "spirit of California wrongful discharge decisions encourages such a rule." *Id.* at 1140, 198 Cal. Rptr. at 367. It also distinguished Crosier's situation from both that of California civil service employees, and "individuals who are prevented from practicing a profession." *Id.* at 1140-41, 198 Cal. Rptr. at 367. "[A]lthough Crosier may have difficulty in reentering the job market," it said, "he is not foreclosed from pursuing his trade or profession with another employer." *Id.* at 1140-41, 198 Cal. Rptr. at 367.

charge."[87] The decision thus theoretically preserved the cause of action. The court expressed a significant preference for the more restrictive *Pugh* formula for liability, proceeded to a good faith analysis partaking more of *Cleary* than *Pugh*, and finally allowed for summary judgment and dismissal more restrictive than either of those cases or *Tameny*.[88]

The trend recognizing three segregable causes of action for wrongful discharge in California continues to develop.[89] Recent cases seem inclined to wander down one or more of the liability paths without attention to their interrelationship or interdependence. At least one decision using that approach has threatened to explode whatever delicate balance *Shapiro* imposed on wrongful discharge, in favor of a wide open *Cleary* inquiry into good faith and public policy.

In *Khanna v. Microdata Corp.*,[90] a court of appeal upheld a wrongful discharge award to an employee fired for suing his company over the amount of a sales commission. The court based its decision solely on the employer's violation of the implied covenant of good faith and fair dealing, without reference to any of the limiting principles of *Tameny*, *Pugh*, or *Shapiro*.[91] It rejected Microdata's argument that the *Cleary* implied covenant principles should be limited to the facts of that case, declaring:

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87. *Id.* at 1140, 198 Cal. Rptr. at 366.

88. The decision in *Crosier* clearly illustrates the quandary facing a court attempting to read the conflicting judicial signals in California's law of wrongful discharge. The court of appeal attempted to reconcile *Tameny*, *Cleary* and *Pugh* by relying upon scholarship in the area which it admitted only in small part interpreted the application of the implied covenant of good faith and fair dealing. *Id.* at 1137, 198 Cal. Rptr. at 364. *See supra* note 72 and accompanying text. The court recognized Crosier's claims as being premised on the *Tameny* and *Cleary* good faith theories. It superimposed upon that formula the *Pugh* burden of proof; and finally, treated the result as one for breach of contract without the accompanying tort liability, which both *Tameny* and *Cleary* recognized. This partial and hybrid use of selected elements of the cases emphasizes how marginal is the guidance of precedent in the area.

89. *See supra* note 72.

90. 170 Cal. App. 3d 250, 215 Cal. Rptr. 860 (1985).

91. The court stated that "[a]lthough elements of all three 'wrongful discharge' theories are present here, we choose . . . to focus on the cause of action for the employer's breach of the implied covenant of good faith and fair dealing implied by law in the contract." *Id.* at 260, 215 Cal. Rptr. at 865.

Microdata conceded that Khanna was terminated solely for commencing and continuing a lawsuit in which he disputed the percentage of a computer sale due him as commission. After being discharged, Khanna dismissed the suit in order that Microdata make good on his commission. When Microdata continued to refuse to pay him, Khanna again brought suit alleging fraud, wrongful discharge, breach of the implied covenant, and breach of the terms of the employment contract. The jury found on his behalf without recognizing liability under a specific cause, and awarded him compensatory damages. *Id.* at 258, 215 Cal. Rptr. at 864.

> We cannot agree . . . that the facts relied upon by the court in *Cleary* are the *sine qua non* to establishing a breach of the covenant . . . . To the contrary, a breach of the implied covenant of good faith and fair dealing in employment contracts is established whenever the employer engages in 'bad faith action extraneous to the contract, combined with the obligor's intent to frustrate the [employee's] enjoyment of contract rights.'[92]

The court proceeded, rather ominously, to suggest that "the mere fact that in past cases a violation of the implied covenant has been predicated on a limited variety of factual grounds does not in and of itself mean that those are the only grounds that will in the future suffice."[93] The court found sufficient evidence in the record to support a breach of the implied covenant of good faith based on a bad faith retaliatory discharge.[94]

In yet another illustration of the inconsistency in the courts, in *Tyco Industries, Inc. v. Superior Court*,[95] another court of appeal

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92. *Id.* at 262, 215 Cal. Rptr. at 867 (citing *Shapiro*, 152 Cal. App. 3d at 478-79, 199 Cal. Rptr. at 619).

93. *Khanna*, 170 Cal. App. 3d at 263, 215 Cal. Rptr. at 868. The "limited variety of factual grounds" to which the court referred, derived from the decision of a court of appeal in Newfield v. Insurance Co. of the West, 156 Cal. App. 3d 440, 203 Cal. Rptr. 9 (1984). The *Newfield* court observed that applications of the covenant of good faith "were *always* predicated upon other public policy grounds, statutory violations, or express (or clearly implied) contract grounds, or upon a combination of elements (e.g., especially longevity of service together with some added element . . .)." *Id.* at 445, 203 Cal. Rptr. at 12, *cited in Khanna*, 170 Cal. App. 3d at 263, 215 Cal. Rptr. at 867-68 (emphasis in original).

The *Khanna* court dismissed this analysis as "gratuitous" since liability in *Newfield* was independently held to have been barred by the statute of frauds. *Khanna*, 170 Cal. App. 3d at 264, 215 Cal. Rptr. at 868.

94. *Compare* Comerio v. Beatrice Foods Co., 600 F. Supp. 765 (E.D. Mo. 1985) in which a federal court applying California law in a diversity action took a much more restrictive view of *Cleary*:

> A literal application of the covenant [of good faith and fair dealing] . . . would result in complete abolition of the employment-at-will doctrine. Although the decisions applying *Cleary* are somewhat confused, it is clear that California courts, including the *Cleary* court, have not abolished the employment-at-will doctrine . . . .
>
> What *Cleary* and its progeny did was create, in certain circumstances, an implied promise that the employee will not be discharged except for good cause. *Pugh* succinctly summarized the circumstances or factors that may give rise to such a promise . . . .

Id. at 769 (citations to *Crain, Shapiro, Newfield, Crosier*, and *Pugh* omitted). The court, applying the *Cleary* principles strictly in the context of the *Pugh* factors, granted the employer's motion for summary judgment where the discharged employee had been employed for only three years, and could not provide evidence of personnel policies or other assurances giving rise to a reasonable belief that he would not be discharged except for good cause.

This attempt to reconcile *Pugh* and *Cleary*, rather than recognize them as developing separate and independent theories for wrongful discharge, sets the federal district court's opinion in *Comerio* apart from most of the recent decisions emerging out of the California courts. *See supra* note 72. However, it shares their skepticism in taking the *Cleary* good faith doctrine literally, without some limitation upon or definition of good faith and fair dealing.

95. 164 Cal. App. 3d 148, 211 Cal. Rptr. 540 (1985). The court of appeal decision issued on a petition for a writ of mandamus brought by employer Tyco Industries,

upheld a denial of liability under the public policy exception of wrongful discharge. The *Tyco* court refused to recognize a public policy exception to the at will rule based upon a statute forbidding employers from misrepresenting terms of future employment.[96] Noting first that Tyco had not violated the statute,[97] the court proceeded to consider and reject the plaintiff's argument that the public policy protecting employees from false employer representations should be sufficient to overcome their at will terminability. The court cited *Shapiro*, *Mallard*, and *Pugh* in cautioning that

> [a]lthough there is dictum in *Tameny* suggesting that there can be a public policy sufficient to support a cause of action for wrongful discharge absent statutory authority, no California cases have so held . . . . Mere allegation of public policy violation of a statute does not suffice to state a cause of action.[98]

Khanna and *Tyco* thus represent essentially opposite decisions made by two courts of appeal at almost the same time. The decisions appear to be based upon the application of two different strands of wrongful discharge theory unraveled from the *Tameny* case. The California Supreme Court has not yet attempted to reconcile or redirect the courts of appeal as they continue to explore, vary, and modify the ambiguous directives of the *Tameny* opinion.[99] Thus, the

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Inc., after the trial court summarily overruled its demurrer to a wrongful discharge complaint brought by former employee Richards.

96. Plaintiff's theory of liability was premised on Tyco's alleged violation of CAL. LAB. CODE § 970 (West Supp. 1986), which reads in pertinent part:

> No person, . . . shall influence, persuade, or engage any person to change . . . from any place outside [California] to any place within the state . . . for the pupose of working in any branch of labor, through or by means of *knowingly* false representations, whether spoken [or] written . . . .

(emphasis added).

97. The court found that the plaintiff had failed to allege knowingly false representations by Tyco, and thus failed to state a cause of action under Labor Code section 970. 164 Cal. App. 3d at 157, 211 Cal. Rptr. at 545.

98. *Id.* at 160, 211 Cal. Rptr. at 546-47, (citing *Shapiro*, 152 Cal. App. 3d at 477, 199 Cal. Rptr. at 613) (emphasis added). The court of appeal found that the trial court had abused its discretion in overruling Tyco's demurrer, and granted Tyco's writ of mandamus.

99. The case of Foley v. Interactive Data Corporation, 184 Cal. App. 3d 241, 219 Cal. Rptr. 866, *review granted*, 712 P.2d 891, 222 Cal. Rptr. 740 (1986) represents the supreme court's first return to the wrongful discharge area since its 1980 decision in *Tameny*. The case involves the discharge of Daniel Foley, branch manager of a financial information agency, who was fired after reporting to company executives that his supervisor had been discharged from a previous position and was suspected of embezzlement.

Interactive Data Corporation (IDC) contends that Foley's discharge related to his substandard work; Foley argues that his work was exemplary, winning him two company awards and a $6700 merit bonus two days before he was fired, and that his discharge was wrongful — resulting not only despite, but because of his good faith attempts to

dimensions of wrongful discharge as defined in that case continue to expand and contract by turn, increasingly devoid of an ascertainable focus or direction.

PROPOSED: A "NO-CAUSE" DISCHARGE STATUTE

The Need for an Alternative

It is now nearly forty years since the *Kouff* decision first announced the conditional status of section 2922, and qualified the previously unconditional right of an employer to discharge at will employees. State and federal courts have been seeking an appropriate standard and perspective to define those conditions and qualifications ever since.[100]

By and large, their efforts have failed. On an ad hoc basis judicial decisions have protected individual at will employees from various objectionable, unethical, discriminatory, retaliatory, or arbitrary dismissals by employers, notwithstanding the absence of such protection in the contract terms between them.[101] In other cases just as equitably demanding, that protection has been withheld.[102] California courts have used a host of different approaches to articulate a vague middle ground between prohibiting and allowing termination at will.

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maintain IDC's reputation within the financial community.

The case presents several issues for resolution by the supreme court. Longevity of employment, as a factor contributing to the employee's right to employment, has perplexed the courts of appeal ever since *Tameny*. Foley had worked for IDC for only six years and nine months. Another aspect of the case involves IDC's policy of maintaining written disciplinary guidelines for employees, including a seven-step termination procedure. It did not follow those procedures in Foley's case; the court may address *Cleary* and its holding that such procedures suggest or prove a covenant to discharge for cause only. Finally, there is no statute at issue in the case either requiring Foley to act, or prohibiting IDC from firing him because of his disclosures. As in the *Tameny* case, therefore, the court will be faced with defining public policy in the absence of statute.

The supreme court's ruling may alter, amend, or even help to clarify the law of wrongful discharge. However, it will just as surely spawn another several years of appeals court renderings that diverge and reform it. It will not prevent the need or incentive to litigate issues surrounding ambiguous discharges. The court will not likely return to the doctrinal rigidity of *Petermann*; thus, it can only discuss, and not define, the degree of "fundamentality" necessary before public policy outlaws a termination. It may limit but will not refute the good faith covenant, so the covenant too will remain inherently incapable of definition.

In short, the supreme court will add to the encyclopedic case law of wrongful discharge. However, it cannot provide a formula that prospectively defines the permissible from the impermissible discharge, while simultaneously protecting its position as the guardian of employee interests and public policies not defined or explicitly formulated. Thus, it will not resolve the inherent inconsistencies in the law, or the need for an alternative. *See infra* note 105; *see also Justices Measure Employer's Rights In At-Will Firings*, L.A. Daily J., June 16, 1986, at 1, col. 6.

100. *See supra* notes 18-66 and accompanying text.

101. *Id.*

102. *See, e.g.*, Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984).

The benchmark wrongful discharge cases provide no coherent methodology for assessing the legality or wrongfulness of at will employee discharge within that middle ground. Rather, their teachings are contradictory and divergent. *Cleary* and *Pugh* suggest certain factors tending to indicate an employee's reasonable expectancy of discharge for good cause only. However, those cases illuminate the inconsistency in the law more than they suggest a solution. They treat circumstantial factors of employment very differently in coming to radically contrasting conclusions about the reasons for, and the degree of, employer liability in the wrongful discharge setting. *Khanna* and *Shapiro* take their separate paths as distinctive reflections of *Cleary's* expansiveness and *Pugh's* restrictiveness. The other cases discussed fall somewhat in the muddled middle ground.

All stepchildren of the *Tameny* decision, they provide little insight into what constitutes public policy sufficient to disallow at will discharge, or how powerful the covenant of good faith is in requiring employers to discharge for good cause, or what circumstances in an employment relationship modify a terminable at will agreement between the parties. The so-called "California Rule," much-heralded as creating a good faith, public policy overlay on all aspects of the employment relationship, is not a rule or even a series of rules at all. There is no sustaining logic in the California decisions, and no guidelines of any predictive value for employer and employee to follow in establishing mutually acceptable terms for employee termination. The protracted, expensive litigation that results yields little for employer or employee in the workplace.[103]

Still, the perceived need for judicial oversight in at will employment disputes remains. So long as an employer retains the right to dismiss an employee without cause, termination remains possible for what will be recognized as objectionable or unfair reasons. Inevitably, such causes will not have been recognized and prohibited by the

103. Meanwhile, the issue of tort liability remains unresolved and untested, and continues to threaten to raise the litigation stakes in wrongful discharge. *Khanna* is a case in point; the court of appeal acknowledged *Tameny*, and recognized tort liability in theory, but proceeded to affirm a small jury verdict representing only those compensatory damages tied to *Khanna's* lost commission profits. The jury awarded no punitive damages. *Khanna*, 170 Cal. App. 3d 257-58, 215 Cal. Rptr. at 864; *see supra* notes 90-93 and accompanying text. Thus, the court of appeal relied on tort principles, but affirmed a damage award based upon breach of contract.

No other decision in the wake of *Tameny* and *Cleary* has been premised on tort liability, although the courts routinely acknowledge the existence of the tort theory alternative. No case therefore has squarely confronted the liability or damage award ramifications of that doctrine as yet.

legislature with the clarity or specificity of its current declarations against discriminatory or retaliatory discharge.[104] The potential for employer abuse of the at will discharge power poses a threat of employee victimization that California courts historically have been reluctant to tolerate and that the state supreme court in *Tameny* categorically refuted.[105]

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104. Professor Summers suggests that the justification for such legal protection "should need no argument. Beyond the claim to equal treatment is the *demand for simple justice and due process* when an employee's valuable right is at stake — his right to his job." Summers, *supra* note 11, at 133. It is such a recognition of inarticulated, but overseeing principles of "justice" that fuels the argument for judicial creativity in supplementing the employee protection statutes.

Professor Blades, in his seminal 1967 article, further expounded upon the need to recognize principles of essential fairness which are impossible to catalogue or define through legislation, when he argued:

> [T]he impossibility of defining with precision the scope of the employer's appropriate control over the employee is insufficient reason for treating that control as boundless . . . . The difficulty in drawing a line might warrant conceding much that is arguable. But numerous demands an employer might make of his employee, when weighed against the interests of the employee as an individual, are clearly not justified by the employer's legitimate concerns . . . . To catalog in advance all the various facets of an employee's life which ought to be immune from intrusion by the employer would be impossible. Such a list could only be supplied . . . through a process of continuing judicial elaboration.

Blades, *supra* note 11, at 1407.

105. The *Tameny* court saw itself as demonstrating a "continuing judicial recognition of the fact . . . that '[t]he days when a servant was practically the slave of his master have long since passed.'" 27 Cal. 3d at 179, 164 Cal. Rptr. at 845 (citing Greene v. Hawaiian Dredging Co., 26 Cal. 2d 245, 251, 157 P.2d 367, 370 (1945)). Notwithstanding the court's insistence that its activism was unexceptional, the California approach contrasts vividly with that of the judiciary in other states. A recent and notable example is provided by the New York courts. In 1983, in Murphy v. American Home Prods. Corp., 58 N.Y. 2d 293, 448 N.E. 2d 86, 461 N.Y.S. 2d 232 (1983) the New York Court of Appeals refused to recognize a cause of action for wrongful discharge absent specific statutory authority. The court insisted that modifying the doctrine of employment at will was a legislative responsibility. Though sympathetic to the argument that "the [at-will] rule yields harsh results for those employees who do not enjoy the benefits of express contractual limitations on the power of dismissal," it concluded:

> Whether these conclusions are supportable or whether for other compelling reasons employers, should, as a matter of policy, be held liable to at will employees discharged under circumstances for which no liability has existed at common law, *are issues better left for resolution at the hands of the Legislature.*

Id. at 301, 448 N.E.2d at 89, 461 N.Y.S.2d at 235 (emphasis added). The court thus denied relief to an employee who had alleged discharge on the basis of his age, and in retaliation for his report to company personnel of accounting improprieties.

The court expressed great reservations about the status of the at will doctrine in New York. Nevertheless, it emphasized the advantage of legislation over judicial action in framing the necessary limitations on discharge at will. It concluded that employment at will should be limited in the light of "public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants." *Id.* at 303, 448 N.E.2d at 90, 461 N.Y.S.2d at 236.

Since *Murphy*, courts in New York have summarily rejected claims of wrongful discharge. *See, e.g.*, Silverman v. Wilmit, 97 A.D.2d 507, 464 N.Y.S.2d 992 (1983); Bergamini v. Manhattan & Bronx S.T.D.A. Surface Transit, 94 A.D.2d 441, 463 N.Y.2d

Thus the need continues for a mechanism by which employers and employees may fairly, routinely, efficiently, and nonlitigiously settle potential disputes surrounding at will terminations.

The Statutory Proposal

Legislation is therefore proposed which does not attempt to redefine good cause or add to the list of explicitly prohibited reasons for discharge. Such measures only recast the current, unsuccessful trend in the California cases. Rather, a "no-cause discharge"[106] is suggested, created by statute and available as an optional, binding contractual alternative to litigation, which would resolve the termination dispute independent of the issue of the employee's at will status, or the lawfulness of the cause for termination.

The no-cause discharge option would be initiable either by the employer or as a response by an employee notified of employer's intent to terminate for good cause. If accepted, the no-cause discharge would constitute a final, binding accord between the parties by which both would waive rights to litigate the discharge. It would avoid altogether the merits of the employer's reasons for dismissing the employee, in favor of the employer's payment of a statutorily defined and calculated discharge payment which would accrue throughout the duration of the worker's employment.

If the parties choose not to offer or accept the no-cause option, they remain free to pursue all current remedies for wrongful discharge, including the tort and contract actions for wrongful discharge and those statutory remedies created at the state and federal level for specific wrongful discharge claims. In such a case, the onus would remain on the employee to successfully allege the wrongfulness of the discharge. The defense of ust cause discharge, however, would remain available to the employer.

The critical difference for an employer rejecting the no-cause dis-

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777 (1983), *rev'd in part*, 62 N.Y.2d 897, 467 N.E.2d 521, 478 N.Y.S.2d 857 (1984). *But cf.* Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982) (exception to the at will rule recognized based upon an employer's handbook, found to constitute part of the contract between the parties such that handbook promises of discharge for cause overcame the rebuttable presumption of employee's at will terminability). The state legislature has yet to address the court of appeals' concerns about the vulnerability of New York's at will employees.

106. Obviously, an employee terminable at will is also one terminable for "no cause." However, the term is used here to distinguish the proposed mechanism from "bad cause" or wrongful discharge, and good cause, now routinely claimed by employers even where dismissal is supposedly at will and requires no showing of cause. *See supra* note 48.

charge option would be that it could *not* subsequently defend a discharge on the basis that the employment was one at will, subject to discharge without cause. Thus, the no-cause discharge and payment mechanism becomes the sole method by which an employer may fire at will.[107]

The Model Statute

To introduce the concept of the no-cause discharge and discharge payment, an illustrative statute is set forth below. The procedures for developing the no-cause theory are not limited to those included in the statute: in particular, the "Discharge Payment" formula developed by the statute is flexible, subject to additional or different variables as well as to the development of a multiplier constant by which the final "Discharge Payments" would be calculated.

THE MODEL CALIFORNIA NO-CAUSE DISCHARGE AND PAYMENT ACT

1. *Title.* The title of this Act shall be the California No-Cause Discharge and Payment Act ("Act").
2. *Purpose.* The purpose of the Act shall be to provide to the parties to an employment contract a procedure whereby the employer may discharge the employee from employment without cause, by paying to the employee a discharge payment separate and distinct from any other payment, salary, bonus, serverance sum, or pension interest, as calculated by the formula(s) set forth in this Act and subject to the conditions and procedures established in this Act.[108]
3. *No-cause payment proposal by an employer upon discharge.* An employer, whether or not otherwise subject to terms of an employment contract with an employee specifying or implying discharge only in the case of just cause, may propose to terminate the employee without cause and upon payment of the full amount of the "Discharge Payment" calculated according to the formula set forth in section 6 of this Act.[109] The no-cause discharge and payment proposal shall be in writing, and shall be signed by the employer.[110]

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107. This is not to imply that at will employment is less available to an employer. In fact, the proposal *expands* the potential use of the no-cause termination option, since it may be recognized by the agreement of the parties even where a length of employment might otherwise be interpreted as guaranteed to the employee by contract. However, a specific termination at will clause in an employment agreement would automatically impose the statutory mechanism. That is, an employee explicitly terminable at will could not be discharged without cause unless the discharge payment accompanied the discharge.

108. The no-cause discharge payment would remain distinguishable from all related payments or benefits accruing to an employee upon retirement or discharge. The discharge payment would supplant, rather than supplement, many of these payments for the at will employee, particularly the employee not qualifying for pension benefits.

109. Thus, the no-cause discharge option is available to the parties as the sole, statutory alternative to those terms establishing duration of employment in the contract. As set forth in section 4 of the Act, the option may be proposed by the employee as well as the employer. *See supra* notes 106-07 and accompanying text.

110. The no-cause discharge and payment proposal itself would require little atten-

4. *No-cause discharge and payment proposal by an employee upon discharge.* An employee subject to termination by an employer for alleged good cause, whether or not subject to terms of an employment contract with an employer specifying or implying discharge only in the case of good cause, may propose to submit to termination without cause and upon payment of the full amount of the "Discharge Payment" calculated according to the formula set forth in section 6 of this Act. The no-cause discharge and payment proposal shall be in writing, and shall be signed by the employee.
5. *Response to the no-cause payment proposal.* The party receiving a no-cause discharge and payment proposal pursuant to section 3 or 4 of this Act shall have a reasonable amount of time as specified in the proposal within which to accept or reject the proposal. The recipient of the proposal must give notice in writing of its acceptance or rejection, and shall be presumed to understand the terms and consequences of the choice to accept or reject.[111]

a. *Acceptance.* Acceptance of the proposal for no-cause discharge and payment shall constitute an absolute waiver by the parties of all legally recognized claims to just or wrongful discharge, and shall result in the employer's obligation to pay to the employee the full "Discharge Payment" calculated according to the formula set forth in section 6 of the Act.[112]

b. *Rejection.* Rejection of the proposal for a no-cause discharge and payment shall be deemed final, and shall constitute an absolute waiver by the parties of the no-cause discharge and payment option set forth in this Act. Failure by a party to respond to a no-cause discharge and payment proposal, or the filing of a cause of action based upon the discharge, shall be

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tion to terms, and would constitute more of a notice than a definitive or final statement of payment obligations. With the exception of the "Work Quality" (WQ) factor, moreover, the variable amounts contributing to the discharge payment calculation are objectively discoverable and easily calculated. Thus, the proposal form could easily be standardized, significant only insofar as it indicated compliance with the time limits obtaining for use of the no-cause discharge and payment process. *See infra* note 115 and accompanying text.

111. The writing requirement is another easily standardized procedural mechanism. However, some procedure might be provided by which a proposal recipient could request a clarification of the terms and calculations in the proposal, or, for good cause shown, request a reasonable extension of time in which to choose to accept or reject its terms.

112. As set forth in section 2 of the Act, the ultimate purpose of the no-cause discharge and payment option is to provide an expeditious, efficient alternative to a prolonged dispute between employers and discharged employees. Essential to the success of such an approach is the speed and completeness of the termination transactions, including immediate and full payment to the discharged employee.

The payment sum for a long-term employee with a satisfactory work record can be significant, easily exceeding a year's wages depending upon the value of the Payment Multiplier (PM) used in section 6 of the Act. The immediate payment obligation of such a large amount, particularly for a smaller employer, may make the discharge payment unaffordable. This can inure either to the benefit or the detriment of the employee. The employer may simply choose to retain the employee, thus providing a measure of employment security not otherwise available to the at will worker. In some cases, however, the cost of a no-cause discharge may so exceed the costs of litigating a discharge for cause that the employer might opt to litigate a discharge dispute otherwise resolvable. In such instances, arbitration to reduce the discharge payment, or to arrange for a periodic payment schedule, might resolve the employer's payment dilemma and protect the employee's payment interest.

deemed a rejection of the proposal as set forth in this subsection.[113]

6. *Calculation of the Discharge Payment.* The Discharge Payment payable to an employee upon acceptance of the no-cause discharge and payment option shall be calculated according to the following formula:

Discharge Payment (DP) = YA x YE x SA x WQ x [PM][114]

The variables included in the Discharge Payment calculation formula are defined as follows:

YA: Years of Age of employee at the time of the no-cause discharge and payment proposal, rounded to the nearest tenth of a year.

YE: Years of Employment of employee by employer at the time of the no-cause discharge and payment proposal, rounded to the nearest tenth of a year.

SA: Salary Average computed over the full YE period, based upon the average of the computed annual salary for each year of such employment.

WQ: Work Quality factor for the employee, which shall be 1.0 if there are no substantial or significant demotions, sanctions, or reprimands in the employment history of the employee as made known to the employee by routine, generally applicable employment relations procedures, and .80 if such substantial or significant demotions, sanctions or reprimands exist in the employment history of the employee.

[PM]: the Payment Multiplier, a constant by which the YA, YE, SA and WQ shall be multiplied to yield the final Discharge Payment (DP) sum.

7. *Discharge Payment Calculation Disputes.* Disputes between the parties concerning the proper calculation of the Discharge Payment to the employee shall be subject to good faith, reasonable settlement by and between the parties. If the parties cannot reach agreement on the Discharge Payment amount, such dispute shall be submitted to final and binding arbitration, the arbitrator to approve either the discharge amount calculation submitted by the employer or employee.[115]

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113. Once again, the rationale to support the finality of the parties' decision to enter into a no-cause agreement is the need for efficiency and certainty in termination situations. In order to fulfill those objectives, the no-cause proposal cannot be a continuously available alternative to the employer and employee, resurrected by one or the other party after final termination or as a potential response to developing strengths or weaknesses in the parties' subsequent litigation. Financial or tactical considerations might lead one or both parties to seek the no-cause alternative as a necessary cost-avoidance measure; but those costs, and the risks and costs of the litigation alternative, are reasonably constant and discoverable within the time limits suggested in the statute.

114. *See infra* notes 116-27 and accompanying text.

115. Some of the factors included in determining the final discharge payment amount will inevitably be subject to varying calculation by employer and employee. Such issues as whether to include only years of continuous, uninterrupted employment in the YE figure, how to recognize employment within various divisions or subsidiaries of a corporation, how or whether to include leaves of absence, are areas of potential dispute which legislation cannot ever clarify without exception, and which some form of resolution must exist to resolve.

Even more subject to disagreement between the parties is the WQ factor, which creates only two alternative categories translating into alternative factor values of 1.0 or .8. Where employee evaluations and supervisory assessments yield a file containing both positive and negative characterizations of the employee's work quality, conclusions about the employee's performance will be arguable at best. The file may be ambiguous, incomplete, or incorrect, and the employee may thus seek to supplement or dispute the WQ factor assessment by the employer. Such disputes, if not informally resolvable, are easily subject to expedited presentation before an arbitrator, and to final and binding decision. Thus, minor disagreements concerning the employee's work quality and longevity may affect the final determination of the discharge payment, without requiring the parties to abandon the no-cause alternative altogether. *See infra* note 120.

Discussion

The concept of required discharge payments is novel, but not without precedent. Various forms of payment to discharged employees have evolved in Europe and the industrialized nations, absent the need to prove wrongfulness in the discharge.[116] The territorial statutes of Puerto Rico provide statutory compensation for any employee under an indefinite term contract who is discharged without good cause.[117]

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116. For a summary of statutory protections extended to dismissed at will employees in France, Germany, Great Britain, and Sweden, see Summers, *supra* note 11, at 508-19. Professor Summers suggests that while western European countries have followed the general principle that employment for an indefinite period could be terminated at will, most now require "reasonable notice" to discharged employees in the absence of serious employee misconduct. Employees are not given a lump sum payment upon termination, but are guaranteed paid employment for that period of time between the notice of termination and actual discharge. The reasonable notice period, which may be months long in duration, effectively creates a specific term of employment upon which the at will employee may rely in the absence of clearly egregious conduct warranting immediate dismissal.

See also Bellace, *Employment Protection in the EEC*, 20 STAN. J. INT. L. 413, 426-38 (1984) [hereinafter Bellace, *Employment Protection*] (discussing the Redundancy Payments Act in Great Britain for employees dismissed for lack of need, payable in a lump sum as a financial cushion to soften the blow of unemployment and based upon employee's age, length of service, and a normal week's wages); Bellace, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. MICH. J.L. REF. 207, 210-17 (1983) (summarizing the International Labor Organization Convention requiring employees of ratifying nations to be extended discharge rights including due process before termination, reasonable notice and/or payment upon discharge, and a requirement of good cause to justify the discharge. The United States was one of only seven countries out of a total of 126 nations to object to the Convention); Committee on Labor and Employment Law, *At-Will Employment and the Problem of Unjust Dismissal*, 36 Rec. A.B. City N.Y. 170, 175-80 (1981) (summarizing development in Europe, Japan, Algeria, Egypt and Canada of advance notice and adjustment payments); Steiber, *Protection Against Unfair Dismissal: A Comparative View* (Paper presented to International Industrial Relations Association, 5th World Congress in Paris) (Sept. 3-7, 1979) (offering a comparison of North and South American, and European, employee protection against wrongful discharge).

117. P.R. LAWS ANN. tit. 29, § 185 (Supp. 1983). The Territorial Legislature enacted the statute in 1976, including in its provisions a detailed six-part definition of good cause for termination, and defining termination "without good cause" as a "discharge made by mere whim or fancy of the employer or without cause related to the proper and normal operation of the establishment." An employee under an indefinite term employment contract who is discharged without good cause is entitled by terms of the statute to compensation upon discharge in the amount of one month's salary, plus one week of salary for each year of service. This payment has been held to be the *exclusive* remedy for an employee discharged "without good cause" in the absence of a specific federal or territorial statutory prohibition of discharge made wrongfully or in bad faith. *See, e.g.*, Lugo v. Matthew Bender & Co., Inc., 579 F. Supp. 638 (D.P.R. 1984); Rivera v. Security Life Ins. Co., 106 P.R. Dec. 517 (1977). The Puerto Rico statute thus differs significantly from the California no-cause discharge proposal, which would allow wrongful dis-

However, the California no-cause discharge option would be distinguishable from previous approaches in several important ways. First, calculation of the payment amount would take into account the principal equitable factors which the California courts now recognize as significant in determining the employee's at will status: longevity of service by the employee, as recognized in *Cleary*, and the presence of commendations, or absence of demotions or criticisms, tending to show a satisfactory work product, as emphasized in *Pugh*.[118]

Second, the payment formula calculation would reflect several factors of fundamental concern in the worker protection area, but not recognized outright by the California cases. Chief among these is the discharged employee's age.[119] A related factor is the full work record of the employee, although the model statute restricts the work record inquiry to sanctions — as such failing to distinguish between the satisfactory and the better than satisfactory worker.[120]

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charge litigation to proceed if the no-cause option were not mutually agreeable to employer and employee.

118. Neither the courts of appeal in *Cleary* and *Pugh*, nor the subsequent cases deriving from them, have recognized any other factors tending to overcome the presumption of at will terminability. *Khanna* argued that the *Cleary* and *Pugh* factors were not the exclusive indicia of employment terminable only for just cause, but the court of appeal did not suggest alternative or additional factors. Future cases will probably announce new elements critical in the wrongful discharge analysis. *See supra* note 99. Once so recognized, those additional indicia could easily be factored into the no-cause discharge formula.

119. Although the employee's age is an indirectly included element in considerations of job longevity, the no-cause proposal includes an independent factor incrementally increasing the no-cause discharge payment based upon age alone. Thus, two employees differing in age, but with otherwise identical work histories, would be subject to different discharge payments, the older of the two employees receiving progressively higher payments depending upon his or her more advanced age.

120. There is perhaps no more difficult qualitative factor to assess in the employment relationship than that of employee job performance. For that reason, the WQ factor, which quantifies an essentially subjective issue, is limited to two alternatives. Either the record of the employee is satisfactory, or it is not, with the characterization having a .2, or 20%, net effect on the employee's discharge payment sum.

This is the area in which arbitration may see its most necessary and frequent use. Resolution of disputes involving job performance, however, are designed to be straightforward. Degrees of employer satisfaction with the employee's work are avoided, in favor of a simple, dichotomous distinction between competent and unacceptable work product. Documented, substantial employer dissatisfaction with the employee would yield a 20% reduction in the final discharge payment amount for the terminated employee. The arbitrator would not be required to find documentation of employee competency or employer satisfaction to assign the 1.0 value. Only upon a showing of documented, significant employer dissatisfaction, effectively communicated, could the employer validly assign the lower .8 WQ value.

The employer seeking a no-cause discharge premised on a reduced discharge payment would be required, therefore, to record and give notice of his dissatisfaction and reprimands. This documentation and communication requirement should have singularly beneficial effects in the workplace.

Inevitably, arbitration will involve employee work histories documenting both positive and negative incidents of employment; the arbitrator will be required to deem the em-

These are the critical indicia of employee reliability, faithfulness and vulnerability that California decisions have relied upon, explicitly or implicitly, in determining whether to allow an at will discharge. However, the no-cause proposal avoids the vagueness and inconsistency the courts have encountered in incorporating such equitable considerations into the fabric of general public policy, or implied contract terms, or the tort-based covenant of good faith. Instead, it quantifies them and derives from them a calculable cost of termination upon which both employer and employee may rely, which simply and efficiently avoids litigation, and which would allocate the cost of termination as an employee benefit.

The proposed formula differs from severance pay and existing statutory payments to employees in several other ways as well. The amount of the payment available to the discharged employee — in particular, the long-term older employee with an untarnished work record — would be significantly greater than the usual severance or statutory payment.[121] Moreover, the discharge payment depends neither upon the beneficence of the employer, or upon a contractual

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ployee's performance as satisfactory or unacceptable, when it is neither. The result will dissatisfy either the employer or employee. However, the proportion of the difference between a positive and negative determination is small enough to minimize inequity caused by the arbitration decision. It will at least yield a reduced payment to the employee whose work history is ambiguous, but does not merit dismissal. At the same time, the 20% reduction in the discharge payment for discharges involving documented poor performance reduces the payment burden on the employer, and may provoke reduced no-cause discharges and payments rather than litigated dismissals for cause.

121. *See supra* note 117 and accompanying text. The payment provisions of Puerto Rico's employee discharge statute provide incremental advances based solely upon years of service. The increase in the payments is relatively restrictive. An employee discharged without good cause after 25 years of service receives only one month plus 25 weeks pay, or slightly over six months payment, no matter how creditable his or her employment record.

The provisions of Great Britain's Redundancy Payments Act are somewhat more generous, and establish three age categories for employees such that the oldest age group receives the highest payments. Employees under the act receive half a week's pay for each year of service between ages 18 and 21; one week's pay for each year of service between ages 22 and 40; and one and one-half week's pay for each year of service when the employee is over 40. For persons with greater than 20 years of service to an employer the calculation is based only on the last 20 years of service. Bellace, *Employment Protection*, *supra* note 116, at 436.

Thus, an employee beginning work at age 18 and working 25 years for the same employer (thus discharged at age 43) would receive payment for the years of service from age 23 to 43. The sum due would represent some 24 weeks of employment. An employee providing the same 25 years of service from age 40 to 65 would be due 30 weeks' payment. As with the formula governing such payments in Puerto Rico, the discharge payment represents about six months of pay. The English statute, however, applies only to a narrow category of employees whose discharge is related to the absence of work and the need for laying off workers. It is not applied in the at will context generally.

agreement for severance pay. Subject only to the parties' election to pursue the wrongful discharge litigation alternative, payment would be immediate and mandatory.

Perhaps most significantly, however, the no-cause discharge alternative would not disturb the current wrongful discharge law in California. The employer intending to discharge an at will employee for a recognized just cause would remain free to do so. The employee desiring to pursue a wrongful discharge claim could so proceed, regardless of a no-cause discharge alternative. The current public policy prohibitions against discriminatory or retaliatory employee discharge related to race, creed, color, age, gender, veteran status, "whistle-blowing," public service, and union membership and activity would continue to constitute grounds for wrongful discharge liability.

From a pure cost-risk standpoint, the incentive to avoid litigation would increase with the size of the discharge payment available to an employee, even in cases where the employee's discharge was probably wrongful. Some cases clearly yielding wrongful discharge damages thus would not be prosecuted. Litigation in which the wrongfulness of the discharge claim was not clear would similarly invite use of the no-cause discharge alternative.[122] While this might affect the amount of discharge litigation, it would not substantively affect the rights of the parties to litigate. Its only effect would be to ensure that the wrongfully discharged employee would not be *required* to bring suit in order to receive some compensation for his or her loss of employment.

Another significant advantage of the no-cause discharge alternative is that it redirects the current transactional costs of employee termination generally, and at will employee termination in particular, and defers litigation expenses for payments made directly to the employee. In cases involving the older and longer-working employee, in fact, it may result in a discharge payment greater than the pro-

122. Beyond the scope of this Article, but a necessary consideration in the effective development of no-cause discharge legislation, is the effect of prior and subsequent federal employee protection statutes in a state legislatively providing for no-cause discharge agreements between an employer and employee. For a discussion of federal labor law policy and its effect on state-created remedies for wrongful discharge, see Browne & Wheeler, *Federal Preemption of State Wrongful Discharge Actions*, 8 INDUS. REL. L.J. 1 (1986). While that article is principally concerned with conflict between federal arbitration law and the law of wrongful discharge in the states, it emphasizes that in all cases if state law " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' and actual conflict will be found," and the state law will be preempted. *Id.* at 5 (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). The economic incentive to enter into a no-cause discharge and payment agreement should result in instances of its use even though the discharge is for a cause proscribed by federal law. If the purpose of the federal (or state) legislation is thereby frustrated, the no-cause discharge may be vulnerable to a preemption claim.

jected expense of a litigated termination.[123] However, the discharge payment still remains the more reliable, fixed cost for termination, comparing favorably to the less accurately calculable cost of wrongful discharge litigation. Moreover, it imposes direct financial responsibility upon the employer for providing what often becomes a living stipend for the discharged employee. These costs are incompletely and less efficiently provided by unemployment compensation, when such compensation is available, and even more inefficiently and inconsistently supplied by the courts.[124]

Discharge Payment Computations and the "PM" Factor

Most of the variables contained in the discharge payment formula are readily ascertainable, and, where subject to dispute can be expeditiously resolved through arbitration. However, the final Discharge Payment (DP) calculation is critically dependent upon the assigned value of a "Payment Multiplier" [PM] factor. The [PM] value is that numerical coefficient, independent of the objective criteria upon which the remaining DP variables depend, which becomes the final legislative control over how much an employee is paid upon discharge. The assigned [PM] value thus becomes the focal point for legislative consideration in quantifying the no-cause discharge option.

As illustration, consider forty-five year old Employee *A*, with an uninterrupted and unblemished employment record of twenty years and an average annual salary over those years of $25,000. The DP calculation for *A*, independent of the [PM] value, would be calcu-

123. Professor Harrison has argued that employers will treat the loss of the right to terminate at will without a discharge payment as a cost, even though it may be a more efficient cost. As such, imposition of the proposal may marginally reduce employee demand, as well as be financed by a reduction in concurrent employee benefits — in particular, the employee wage. Harrison, *An Interest and Cost Incidence Analysis*, *supra* note 3, at 356-62. However, the value of job security that employees will place on employment subject to the no-cause discharge should offset these costs, that is, fewer and lower-paying jobs.

124. *Id.* Professor Harrison further comments:

> The goal of efficiency . . . does not appear to be well-suited for judicial action . . . . A legislative setting is more appropriate for the collection and study of the types of economic data needed to identify changes that actually do have the desired economic effects . . . . The preferred version of legislative action would be one that reduces transaction costs. This approach would ensure that only efficient exchanges take place and would change the focus of the efficiency issue. Transaction costs would not be eliminated, but merely transferred to the public sector. The issue would remain whether the public investment would generate sufficient returns to recommend it.

Id. at 358, 359 n.161.

lated as follows:

DP(*A*) = YA x YE x SA x WQ x [PM] = (45) x (20) x (25,000) x (1) x [PM]= 22,500,000 x [PM]

Assigning a [PM] value of .0011 to the formula, *A* would receive the sum of $25,000, or the average salary figure of one year, as discharge payment.[125] Assuming an increasing salary for employees over the term of employment, that amount would probably represent significantly less than the annual salary of the employee at the time of discharge. At a [PM] value of .002, the DP amount would rise to $45,000; and that DP value would increase or decrease proportionally for greater or lesser [PM] values.

For Employee *B*, possessing the same work record and salary but being age fifty-five at termination, the amounts involved would be significantly higher:

DP(*B*) = YA x YE x SA x WQ x [PM]= (55) x (20) x (25,000) x (1) x [PM]= 27,500,000 x [PM]

yielding DP sums of $27,500 and $55,000 for the same [PM] values of .0011 and .002, respectively.

Obviously, each year of employment incrementally increases each of the variables contributing to the DP calculation. The YA and YE factors increase arithmetically, and the SA value is dependent upon the average annual salary increases earned by the employee.[126] For the competent, older, loyal employee, continuous employment thus "earns" an increasingly accelerating no-cause discharge payment sum, the dual effect of which is an increase in the employee's job security, and a warranted postemployment benefit upon discharge for no cause.

How much that security and pension should be worth in dollars is an essentially legislative, and inevitably political, issue finally expressed in the assigned [PM] value for the no-cause discharge. There is no single methodology for creating a "just" [PM] figure. In fact, the legislature might well perceive the need to establish different val-

125. The one year average salary value is used simply as a benchmark, providing a point of reference for establishing [PM] values. A more meaningful reference point for employers and employees might be that [PM] value resulting in payment of a full year's current salary to the employee. For the limited purposes of illustrating the DP formula, however, the annual payment history and current salaries of fictional employees *A* and *B* have not been supplied.

126. The net result of the arithmetical increase of several factors is a greater than arithmetical increase in the discharge payment. Thus as an illustration, an employee discharged after 20 years' employment would not simply receive twice the amount he or she would have received upon discharge after 10 years. Assuming no change in the quality of the employee's job performance, discharge after 20 years would yield a discharge payment 2.67 times the payment after 10 years. Assuming the further probability that a worker's average annual salary after 20 years is higher than that after 10 years, the difference between the two discharge payments for the two would be even greater, in direct proportion to the difference in the average annual salary figures.

ues for different industries and professions, depending upon numerous distinguishing factors for a particular type of employment: average period of continuous employment in the job sector considered; the magnitude or disparity in wage increases within or between job types; the presence and accessiblity of pension benefits within a particular industry (offsetting the immediacy of the need for the no-cause discharge payment); the potential of the discharged employee to find substitute work; and the expectation of job security within the type of employment involved. Such categorical distinctions underscore the flexibility of the no-cause discharge payment formula, as well as the principles underlying it. More importantly, they would focus legislative attention on the need to establish [PM] values sensitively and in light of the variable needs of a diverse and changing labor market.[127]

Regardless of the method for establishing the [PM] value(s), or the amount of the discharge payment that the [PM] value yields, the no-cause discharge payment formula retains its flexibility for adjustment through change in the constant. As additional indicia of the at will employment relationship are granted circumstantial significance by courts in wrongful discharge litigation, those factors may be quantified and factored into the discharge payment computation along with job longevity, age, and work quality. Any such change in the formula could, once again, be controlled by the [PM] value.

Thus, the legislature, employers and employees may continue to

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127. The principal California wrongful discharge cases suggest that California courts have not appreciated the need to distinguish between the very different labor markets involved in litigation. Thus the job longevity of a real estate vice-president, in *Shapiro*, can be subjected to absolute comparison with that of the blue-collar airline worker in *Cleary*, or the industrial manager in *Pugh*, with no further judicial inquiry into the average employment life for the different positions, or the expectations deriving from the three very different career tracks involved.

Nevertheless, developing the [PM] value to accurately reflect differences in labor markets is even difficult in theory. As the Harrison article notes, "[t]he identification of labor markets with potential for efficiency, the determination of the quantity of job security that can be efficiently transferred, and the legislative specification of labor markets in sufficient detail so as not to affect labor markets in which changes would be inefficient are problems that would remain formidable." Harrison, *An Interest and Cost Incidence Analysis*, *supra* note 3, at 358-59.

Even if the objective data required for such distinctions could be collected and accurately assessed, the final assignment of a [PM] value ultimately will take on a political dimension. Neither the efficiency model proposed by Professor Harrison, nor economic theory justifying the no-cause discharge proposal, can adequately account for the vagaries of such political decisionmaking, and the disparity in discharge payments for different industries that it could conceivably generate. The strongest argument for a single [PM] value for no-cause discharges thus might be its insulating effect from particular employment interests, in favor of a constant value applicable across the labor pool.

selectively incorporate judicial developments in wrongful termination litigation, while compensating terminated employees and protecting the discharge rights of employers more clearly and efficiently than does current wrongful discharge litigation.

Conclusion

At will termination in California, once granted the unique status of statutory protection, has been irrevocably and justifiably qualified and confined by the California legislature and courts. But legislative prohibitions against specific types of discharge, combined with a judicial insistence that at will termination be subjugated to a variety of public policy imperatives, have yielded a troubling, ambiguous and inconsistent law of wrongful discharge. While the at will doctrine has endured its harshest critics and most intense legal assaults, the significant decisions in the area provide little guidance or definition upon which employers or employees can rely in determining when at will discharge is permitted by contract, or when it is disallowed. The result is costly litigation that taxes the parties inefficiently and only marginally protects either of them from the abuses of the other.

The California courts will undoubtedly continue to assess the propriety of employee dismissals, interpret the provisions of employment contracts, define the standard of duty owed by an employer to an employee, and recognize new prerogatives of public policy in concert with the legislature. The ad hoc, piecemeal, retrospective nature of its directives will just as certainly continue to confound employers and employees.

The no-cause discharge alternative proposed in this Article does not attempt to recast that process, but rather attempts to provide a way of avoiding it. It creates a simple, predictable, efficient termination procedure that compensates terminated employees according to the same elements of the employment relationship that courts have erratically recognized as suggesting employer liability for discharge. Rather than establish these criteria as vague standards that may or may not result in a damage award, the no-cause discharge payment mechanism defines and quantifies them. The costs of a dismissal become foreseeable, calculable, involve virtually no transactional expenses, and are paid efficiently and directly to the employee.

Finally, the mechanism is vital and flexible enough to be tailored to the varying demands of different sectors of the employment market. It supplements, rather than replaces, judicial and legislative prohibition of wrongful discharges, allowing termination at will to continue while softening the inequitable results of the at will discharge doctrine that have so troubled the courts and legislature.